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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-817

DONALD EVERETT D.,
DENNIS LOUIS D.,

Petitioners,

v.

THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT

The petitioners, Donald and Dennis D., respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, Third Appellate

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District.[1] Such judgment became final and was entered on October 10, 1978 following the issuance of an opinion on August 8, 1978.

OPINIONS BELOW

The opinion of the court of appeal affirming petitioner's convictions in the Juvenile Court for criminal offenses was filed on August 8, 1978. The unreported opinion of that court is attached to this petition as Appendix 'A'. A timely petition for rehearing in the court of appeal was denied on September 1, 1978. The order of the Supreme Court of California denying discretionary review in petitioner's case was entered on October 4, 1978. The mandate in petitioner's case was thereupon entered by the court of appeal on or about October 10, 1978.

JURISDICTION

The jurisdiction of this court is invoked under title 28, United States Code

1. The Court of Appeal for the State of California, Third Appellate District will be referred to hereafter as the "court of appeal".

section 1257(3). The order of the court of appeal became final on October 4, 1978 when the Supreme Court of California denied petition for discretionary review. (Calif. Rules of Court, Rules 25, 28.)

QUESTIONS PRESENTED

1. Where a direct appeal is permitted in a criminal or quasi-criminal case by state law, what minimum standards of substantive and procedural fairness are imposed upon the proceedings by the Fourteenth Amendment's guarantee of due process of law; specifically,

A. Are the requirements of due process met when a state reviewing court refuses to determine whether a reasonable trier of fact could have found guilt beyond a reasonable doubt in light of all the evidence presented to it; limiting its review of the facts to mere consideration of whether there is any evidence in the record, standing alone, which supports a finding of guilt?

B. Are the requirements of due process met where a state reviewing court

refuses to resolve a substantial contention raised by an appellant through a technique of refusing to recognize the existence of a portion of the trial record which supports that contention?

2. When the defendant in a juvenile criminal case is required to submit to a trial before a subordinate judicial officer who does not have the authority to decide the case, and when a proper decision of the matter requires that crucial conflicts in the testimony be resolved by assessment of the demeanor and credibility of the witnesses, are the requirements of due process met where the case is decided by a "judge" who does no more than read a reporter's transcript of the testimony presented to his subordinate which is devoid of the essential "demeanor" information ?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the Sixth and Fourteenth Amendments which provide in pertinent part:

AMT VI: "In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

AMT XIV, Section 1: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunitites of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This case arises from an incident which took place in West Sacramento, California on July 24, 1977 between petitioners, who are two minor brothers, and one Loren Perry.

In the late evening hours of July 24, Mr. Perry drove his 1955 Nash automobile into a darkened trailer sales lot which was adjacent to the mobilehome park in which the boys lived. The sales lot was also adjacent to the Hawaiian Hut, a bar known as a hangout for homosexuals.

Perry explained that it was his intention to go into the Hawaiian Hut, but

that he had decided not to park in the bar's own lot because he did not want his Nash to be dented. According to him, he exited his vehicle carrying no wallet, and with only fifty-five cents in his pocket.

Then, according to Perry, he was accosted by petitioners, threatened with various blunt objects, and asked for money. When he demonstrated he had only small change, Perry stated the boys then fled, and that he chased and physically detained Donald D. for the authorities.

The boys told a very different story, which was corroborated by a neighbor woman with whom the boys were out walking. They indicated that as Donald broke off from the group to go over and use the restroom at a nearby gas station, Perry drove into the darkened lot, accosted Donald, and issued a sexual proposition to him. Donald was frightened by this, and called for his older brother to help him in repelling what he saw as an attempt at molestation. The older Dennis responded and bluntly confronted Perry. Perhaps fearing arrest for solicitation of a minor [Cal. Pen. Code § 647a], Perry became

agitated and, in the ensuing confusion, managed to grab Donald and drag him into the Hawaiian Hut where a discussion ensued as to whether the other bar patrons should "take me over to the river and cut my throat". Apparently it was decided that calling the police and accusing Donald of attempted robbery would be a more prudent course of revenge. When officers arrived, the boys tried to relate their version of the facts but were commanded to "shut up".

At the conclusion of testimony, the subordinate referee who heard it instructed the bailiff to tell the "so called victim" he was free to leave. He then took the matter under submission, deciding it a few days later through a written memorandum[2/] in which he implied he was going no further than determining that Perry's testimony was not inherently incredible. The referee also declared he was resolving the conflicts in the testimony on the basis of his "personal opinion" that petitioners considered homosexuals "easy marks" for robbery.

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2. The text of this memorandum is reproduced in appendix 'B' to this petition.

Such "personal opinion" was supported by no testimony that petitioners, who did not appear to have prior records, had any propensity to engage in acts of violence against such persons.

In accordance with California law, at petitioners' request the matter was then submitted to a judge of the Juvenile Court for decision. The "judge", acting as the trier of fact, then "independently" decided that guilt was established beyond a reasonable doubt after privately reading a reporter's transcript of the testimony and expressly adopting the statements in the referee's advisory memorandum of decision. He personally heard no testimony.

Petitioners thereafter appealed to the court of appeal. That court affirmed the juvenile judge's findings, holding that (1) it was bound to defer to the judge's assessments of credibility of witnesses (Made upon the exact trial transcript as was before it); (2) in accordance with established precedent, it would not determine whether guilt had been determined beyond a reasonable doubt or consider any evidence consistent with innocence. Only whether the verdict was supported by

"any substantial evidence" would be considered.

The state appellate court, most significantly, refused to recognize the existence in the record of the referee's statement he was resolving the matter on the basis not of evidence presented but his own "personal opinion".

The court of appeal declined to correct its refusal to recognize this key segment of the record, as well as its refusal to consider petitioner's claims of error based upon such record, when its omissions were pointed out to it in a timely petition for rehearing.[3/]

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3. The text of petitioner's petition for rehearing is set out in appendix 'C' to the petition.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

This case raises a number of fundamental questions, not addressed in any recent holdings of this Court, concerning the extent to which the Fourteenth Amendment's guarantee of due process requires the states to maintain any minimum level of integrity and fairness in legally prescribed methods by which facts are found at trial and reviewed on appeal.

The Court has, of course, decreed the substantive standard according to which criminal guilt must be found, i.e., beyond a reasonable doubt (In re Winship (1970) 397 U.S. 358); but where such a standard is applied through methods which make it impossible for the requisite degree of certitude to be reached, how can it be said the standard is being followed ?

Nor has any decision of this Court gone into the question of whether the states are constitutionally free to virtually ignore on appeal the central question of whether guilt has been satisfactorily proven beyond a reasonable doubt; or whether they are free to base their conclusions of law upon arbitrary

or captious refusals to recognize portions of the record before them which support claims of error.

I

WHERE STATES ESTABLISH AVENUES OF APPELLATE REVIEW, DUE PROCESS DOES NOT PERMIT STATE REVIEWING COURTS TO REFUSE TO ENFORCE THE CONSTITUTIONAL GUARANTEE OF PROOF BEYOND A REASONABLE DOUBT WHILE PROVIDING EXTENSIVE REVIEW OF ALL MANNER OF SECONDARY QUESTIONS

The opinion of the court of appeal refuses to give any consideration to the question of whether petitioners' guilt was satisfactorily established beyond a reasonable doubt. Following a firmly established line of California decisions which hold that an appellate court may not directly consider the issue of guilt or innocence, that it must ignore all evidence consistent with innocence, and must cease its review at the point where any evidence is found consistent with guilt, even that which is "weak" or "physically impossible" (In re Leonard M. Cal. Ct. App. 2 Crim. 30946, October 27, 1978) ___ Cal.App.3d ___; ___ Cal.Rptr. ___),

the court of appeal held itself bound by the factual determinations of the "judge".[4]

This quite typical refusal of a state first-level reviewing court to be concerned with the central issue of guilt greatly accounts, in our respectful opinion, for the conversion of the criminal case into a procedural game of wits instead of a search for truth. This in turn leads to a widespread public feeling that our courts occupy themselves primarily with arcane exercises in sophistry through which they routinely free guilty persons on the basis of "technicalities"; the innocent being totally ignored.

The test of review applied by the court of appeal here was that formulated by the California Supreme Court in People v. Newland (1940) 15 Cal.2d 678, 681, 104 P. 2d 778 : "The court of appeal will not attempt to determine the weight of the

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4. The absurdity and injustice of such a holding is, of course, highlighted here by the fact that the "judge" made his finding on the same reporter's transcript as was before the court of appeal. (see part II, post.)

evidence . . . it must be made clearly to appear that upon no hypothesis whatsoever is there sufficient substantial evidence to support the conclusion reached in the court below." And as repeated again and again in such more recent California decisions as People v. Reyes (1974) 12 Cal.3d 486, 497 [526 P.2d 225], "The test on appeal is . . . not whether the evidence proves guilt beyond a reasonable doubt." (Emphasis added.)

Testimony given by representatives of California's appellate judiciary at a recent legislative hearing place in even starker relief the aspersion with which prevailing philsophy regards the idea that state reviewing courts should consider it their duty to correct "mere" substantive injustices.[5]

This philosophy was recently carried to the most extreme degree ever when an appellate court accepted as sufficient evidence which was shown to be physically

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5. California Legislature, Assembly Committee on Criminal Justice, Scope of Appellate Review (hearing transcript) September 11, 1978.

impossible. (In re Leonard M., supra, ___ Cal.App.3d ___; ___ Cal.Rptr. ___.)

For example, after a spokesman for the State Supreme Court confirmed that that court regards itself as ". . . not a court of error, it is not necessarily a court of justice. . . ."[6], and that decisions are often upheld if supported by any evidence at all[7], a representative of the courts of appeal, also the president of the State Judges' Association, then went on to confirm that factual review on that level is limited to consideration of whether there is any evidence which is not "inherently improbable", and that even overwhelming evidence inconsistent with guilt is treated as nonexistent.[8] Having opened with the observation that the prime function of the courts of appeal is to "develop the common law" and deal with precedent,[9] the witness closed with the sentiment that there was no room for improvement in California's system of justice, which he described as "the best system in the world".[10]

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6. Ibid., p. 21.
7. Ibid., p. 22.
8. Ibid., pp. 26-27.
9. Ibid., p. 24.
10. Ibid., p. 32.

In respectful disagreement, we submit that at least one substantial improvement is required: protection of innocent persons who are mistakenly convicted of crimes, whether or not the mistake has significant "policy" implications.

In Burks v. United States (1978) ___ U.S. ____ (Jan. 14, 1978, 46 U.S.L.W. 4632), where the Court held that double jeopardy prohibits a retrial after the reviewing court has found the evidence insufficient, the Chief Justice observed that the Court had previously reviewed factual records from federal convictions and found that the prosecution had failed to prove guilt beyond a reasonable doubt. "In holding the evidence insufficient to sustain guilt, an appellate court determines that the prosecution has failed to prove guilt beyond a reasonable doubt. (See American Tobacco Co. v. United States (1946) 328 U.S. 781, 787 n. 4." (Id. at p. 4636, n. 10.)

In Freeman v. Zahradnick (1977) 429 U.S. 1111, the Court was presented with this issue as a constitutional question. However, the Court denied certiorari, apparently because the Court would have

also had to tackle the question of whether this kind of a claim would be cognizable on federal habeas corpus (an issue which is not presented by this record). Justices Stewart, Marshall, and Brennan dissented, however, and urged that the application of the "beyond a reasonable doubt" standard of Winship should not be immune from constitutional enforcement on appeal. Justice Stewart posed the following hypothetical situation which could lead to "bizarre results":

"Defendant A, whose guilt is conclusively established by 20 eyewitnesses, clear fingerprints, and an unimpeachable confession, is denied due process if the jury is instructed that he can be found guilty by a preponderance of the evidence; that much is clear from Winship. Defendant B, against whom there is but one flimsy piece of evidence -- which falls far short of sufficiency to prove guilt beyond a reasonable doubt but barely meets the 'greater than zero' test of the no evidence rule -- is not denied due process so long as the instructions are proper. Clearly, however, defendant B is much more likely to be innocent that defendant A."

As Justice Stewart aptly concluded,

"That pair of results could well be thought to be at war with the purpose of the Winship decision -- to reduce 'the

risk of convictions resting on factual error', to provide 'concrete substance for the presumption of innocence', and to ensure that 'the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned'. 397 U.S. at 363-364."

In our view, both the cause of due process and the cause of public respect for the judicial process would be better served if at least those state reviewing courts which hear appeals on a non-discretionary, first level basis[11/] followed the example of their counterparts in other civilized nations by giving as much attention to the question of whether the case before them has been satisfactorily

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11. We quite purposely limit our argument to those stages of the appellate process wherein review is of right, as opposed to higher levels of the process wherein review is discretionary. Many countervailing considerations could well justify discretionary tribunals such as this Court or most state supreme courts in leaving review for correctness to the first-level appellate courts, reserving their own scarce resources for matters of transcending public importance. Distinctions between rights inerent in the non-discretionary vs. discretionary stages of the appellate process have been drawn by the Court on many occasions, e.g., Anders v. California (1967) 386 U.S. 738.

resolved on the facts as is afforded to procedural matters.[12]/

In England, "appellate judges tend to regard their job as complete when they reach a correct conclusion on the case presented to them . . . furthermore, they are so involved with the idea of the supremacy of Parliament that they do not think much about their own law-making functions. . . ." M. Zander, Cases and Materials on the English Legal System (1973) p. 420.

The right of a litigant to a hearing from a first-level reviewing court should be conditioned more on whether he has been unjustly convicted than upon whether

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12. The scope of review on first-level appeal suggested herein would cause no actual increase in the workload of state appellate courts. Such courts are already required to read the entire record in order to determine, for example, whether procedural errors pinpointed by the counsel are harmless. From this point, it requires very little extra effort for the court to ". . . [give] earnest thought in this case to whether it is one in which we ought to set aside the verdict of the jury notwithstanding the fact they had every advantage and, indeed, some advantages we do not enjoy." (Regina v. Cooper (Sean) (1969) 1 Q.B. 267, 271.)

his case presents some novel point of "policy" which the legal profession would enjoy seeing discussed in the reports.[13]/ Moreover, as should be readily apparent to those who have followed the mushrooming habeas corpus dockets of federal district courts, the refusal of state courts to be much concerned with the actual correctness of judgments doubtless contributes to feelings of resentment and injustice, shared by the guilty and innocent alike, which lead them to an obdurate determination to pursue every possible road of attack on their convictions.

We respectfully urge that no further time should pass before this Court decides, for the first time in the history of the republic, upon the degree to which the Fourteenth Amendment speaks to the substantive aspects of the criminal appellate process.

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13. As this Court pointed out not long ago in another context, there is a strong "public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth". (Alderman v. United States (1969) 394 U.S. 165, 174.)

A. Due Process In No Event Permits State Reviewing Courts To Engage In Reconstruction Of The Record On Appeal In Order To Avoid An Appellant's Claim Of Substantial Error

Closely related to the preceding argument is the question of whether a state reviewing court is permitted by due process to go beyond the point of applying every presumption and intendment derivable from the record in favor of a judgment and cross over into the realm of reconstruction of the appellate record in order to avoid dealing with an appellant's assignments of substantial error which arise from such record.

Here, the case against petitioners was initially decided at trial by a written memorandum opinion (see appendix 'B') which contains the following statement as a reason for decision: ". . . it is the personal opinion of the Court that the minors believed such a person [i.e., a homosexual] would be 'easy pickings'" [i.e., for mugging].

It was accordingly assigned as error on appeal that the case had been

improperly decided at trial on the basis of "personal opinion" instead of evidence, in that there had been no proof adduced that the appellants were hostile to, or in the habit of preying upon, homosexuals.

Astoundingly, the court of appeal greeted this contention with the statement, "Moreover, we find nothing in the record to support defendants' assertions that the referee . . . resolved the matter on the basis of his personal opinion. . . ." (emphasis added.) (Opn. p. 5.)

The dictionary[14] defines "nothing" as "no thing; not anything -- no part, element, or trace -- a thing that does not exist. . . ." Yet clearly, the referee's candid admission of how he was deciding this case does exist in cold black and white type in this record. As much was bluntly pointed out to the court of appeal at pages 3-4 of appellant's petition for rehearing.

The court of appeal's refusal to recognize the existence of this error-laden statement and to decide whether, indeed

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14. Webster's New World Dictionary (1976) 2d College Ed., p. 973.

it was proper for the referee to decide a case on the basis of his personal prejudice constitutes a refusal by that court to allow a litigant before it to be heard. Such a refusal constitutes a denial of due process of law by the Court of Appeal.

Where a state provides for appeals in criminal cases, the proceedings on such appeal are part of the process of law under which convictions must stand or fall under the due process clause. (Cole v Arkansas (1948) 333 U.S. 196, 201.) Due process requires that an opportunity be granted, at a meaningful time and in a meaningful manner, for a hearing appropriate to the nature of the case. (Boddie v. Connecticut (1971) 401 U.S. 371, 378; cf. Eskridge v. Washington State Board (1958) 357 U.S. 214.)

The requirements of due process that "justice must satisfy the appearance of justice" are simply not met when a reviewing court refuses to deal with contentions made by an appellant, or when it decides them on the basis of erroneous characterizations of the record. (See Proctor v. Warden, Maryland Penitentiary, ___ U.S. ___ [No. 77-5898, April 17, 1978,

23 Crim.L.Rptr. 4024, 4025].)

It has been well established that an indigent appellant is entitled to the services of an attorney who will argue every contention which arises from the record with vigor and skill. (Anders v. California (1967) 386 U.S. 738.) Implicit in this is the premise that the court receiving such contentions will give them conscientious consideration and decide them according to law. As this case demonstrates, this premise is not necessarily taken as given by all courts. The state supreme court, unfortunately, does not consider it of sufficient importance to warrant its attention that a lower court has proceeded in a "merely" incorrect manner.

We respectfully submit, therefore, that this Court should act to expressly guarantee the right of an appellate litigant to the full and fair consideration of his nonfrivolous contentions in light of the actual content of the record and the applicable constitutional and state law by declaring such consideration to be guaranteed by due process.

The enforcement of such a discipline

upon first-level courts of appeal will, we believe, greatly serve the cause of judicial economy as well as the cause of justice.

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II

WHERE RESOLUTION OF A CRIMINAL CASE REQUIRES THE ASSESSMENT OF THE CREDIBILITY OF CONFLICTING WITNESSES, DUE PROCESS REQUIRES THE TRIER OF FACT PERSONALLY HEAR THE TESTIMONY

As suggested above, petitioners do not so much ask here whether they were accorded a "fair trial", for that would presuppose they had a trial. They ask instead whether the Constitution allows a contested accusation of crime to be adjudicated by means of a system in which the person who hears the case cannot decide it, and the person who decides it does not hear it.

The answer to this question was correctly given last term by three justices of this Court:

"[A]s is self evident . . . the master's function at the hearing is, in large part, to assess the credibility of witnesses. That function simply cannot be replicated by the "Judge", acting in his essentially appellate capacity

reviewing the record; as amicus cogently notes, "[t]trials by transcript can never be more than trials by substantial evidence." (Swisher v. Brady (1978) ___ U.S. ____ [57 L.Ed.2d 705, 725] Marshall, J. dissenting.)

Before going further, it should be said that there may seem to be an inconsistency between this point and Part I, ante. Any inconsistency, however, is the direct product of the worst-of-both-worlds double standard which has been created by California courts: a reporter's transcript is sufficient for a trial determination of guilt beyond a reasonable doubt, but not so on the appellate level.

It is our view that either a transcript is sufficient or it isn't. Moreover, we think it not inconsistent to argue that a reviewing Court should consider the evidence of innocence on appeal as well as the correctness of a verdict, giving due deference to determinations of witness credibility made by a trier of fact, while also insisting that such determinations not be made at trial on the basis of transcripts which do not contain the very "demeanor" information necessary to

fix credibility.

A. The Nature Of The California Referee System

The powers of the California juvenile referee are sharply circumscribed. The State Constitution, Article VI, section 22, limits him to the performance of "subordinate judicial duties". No sentence imposed by him is effective until countersigned by a judge. (Cal. Welf. & Inst. Code § 249; see also Ibid. § 251.) Above all, he cannot make findings of fact in the cases he hears. (In re Edgar M. (1975) 14 Cal.3d 727 [537 P.2d 406]; see also Jesse W. v. Superior Court (1978) 20 Cal.3d 893, fn. 5 at 899 [576 P.2d 963], cert. pdg. California v. Jesse W., # 78-327.)

Instead of simply deciding that cases should be assigned for trial to judicial officers having decision-making authority, the Edgar M. court held that henceforth, while referees would not decide cases, they would keep their jobs. Trials would still be involuntarily assigned to them. They would continue to hear the testimony of witnesses. After the testimony was presented, a transcript of it would be typed

up and presented to the juvenile court judge. (Cal. Welf. & Inst. Code § 252.) The judge would read the transcript and make an "independent", de novo determination of the case.

The Court declared that a written transcript would provide the judge with enough information to "independently" decide the case:

"Thus, a judge's decision to deny the application [for rehearing] and hence adopt the referee's determinations as those of the Court is based on data amply sufficient for the forming of a judgment independent of that of the referee." (In re Edgar M., supra, 14 Cal.3d at 735-736.)

This astounding pronouncement is, of course, contrary to the wisdom of centuries of jurisprudential thought, exemplified in the following statement by Jerome Frank:

"A stenographic transcript correct in every detail fails to reproduce tones of voice and hesitations of speech that often make a sentence mean the reverse of what the words signify. The best and most accurate record is like a dehydrated

peach; it has neither the substance nor the flavor of the fruit before it was dried." (Broadcast Music v. Havana Madrid Restaurant Corp. (2nd Cir. 1949) 175 F.2d 77, 80.)

It is also contrary to the California court's assessment of its own abilities to "independently" second guess the referees who find facts for it in original proceedings. (In re Hurlic (1977) 20 Cal.3d 317, 325, [572 P.2d 57].)

The California court also did not try to reconcile its results in Edgar M. with prior statements of this Court holding that the right to confront witnesses contemplates the right to have the confrontation occur before the actual trier of fact:

". . . '[t]he primary object of the [Confrontation Clause of the Sixth Amendment] . . . was to prevent depositions or ex parte affidavits . . . being used against the prisoner in lieu of personal examination and cross-examination of the witness in which the accused has an opportunity not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand

face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.' (Mattox v. United States (1895) 156 U.S. 237, 242-243"; Barber v. Page (1968) 390 U.S. 719, 722, see also Berger v. California (1969) 393 U.S. 314, 315.)

A final question, made inescapable in the wake of trials-by-transcript, is whether the state can continue to maintain a separate criminal court system for juveniles wherein fundamental constitutional rights including bail and trial by jury are withheld, where all decisions are made by some incorporeal entity who sits like the Wizard of Oz behind the closed doors of his chambers? Where in that is there the "concern", the "sympathy" and the "paternal attention" which this Court has postulated to be the justification for withholding essential rights from the young? (McKeiver v. Pennsylvania, (1971) 403 U.S. 528, 550.)

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CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the court of appeal.

Respectfully submitted,

QUIN DENVIR
State Public Defender

EZRA HENDON
Chief Assistant
State Public Defender

LAURANCE S. SMITH
Deputy State
Public Defender

APPENDIX A

APPENDIX 'A'

(Text of Unreported Opinion
of the California State Court of Appeal)
[Original page numbers in brackets]

[1]Pursuant to Welfare and Institutions Code section 602 separate petitions were filed in juvenile court charging each of the minor brothers, Donald, 15 years of age, and Dennis, 16-years-old, with attempted robbery by means of force and fear. (Pen. Code, §§ 211, 664.) Dennis additionally was charged with malicious mischief. (Pen. Code, § 594.) The petitions were heard by a referee who found the allegations sustained beyond a reasonable doubt and Donald and Dennis to be persons described in section 602. Defendants' application for rehearing was denied. Following the disposition hearing, Donald was placed on six months' probation under the supervision [2] of the probation officer; Dennis was declared a ward of the court and placed him in the custody of his parents and was ordered to make restitution in the amount of $75.16; in addition both Donald and Dennis were ordered to participate in the juvenile hall work program for 16 hours or two weekends. Both minors appeal from the "judgment".

The minors contend they were deprived of a fair hearing guaranteed by the due process clause of the constitution. They assert the referee was biased and determined their guilt on speculation and his personal opinion, which, in effect, resulted in the application of the substantial evidence standard of proof rather than the reasonable doubt standard.

We have reviewed the record, including the comments of the referee and his notice of decision and find the minors' assertions that he was biased and that he approached his task of fact-finding in a "sloppy and shoddy manner" to be totally unfounded.

California courts have applied the reasonable doubt standard since the United States Supreme Court in In re Winship (1970) 397 U.S. 358, 377-378 [25 L.Ed.2d 368, 382-383] held that juveniles, like adults, were constitutionally entitled under the due process clause to proof beyond a reasonable doubt at the adjudicatory stage when they are charged with an act which would constitute a crime if committed by an adult. (In re Roderick P. (1972) 7 Cal.3d 801, 809; [3] Richard M. v. Superior Court (1971) 4 Cal.3d 370, 378.)

Reasonable doubt is defined as not a mere possible doubt. "It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge." (Pen. Code, § 1096; People v. Miller (1916) 171 Cal. 649, 652.) Thus to justify a criminal conviction the trier of fact must be reasonably persuaded to a genuine certainty. (People v. Hall (1964) 62 Cal.2d 104, 112; People v. Garcia (1975) 54 Cal.App.3d 61, 66-67.)

Here Loren Perry testified that in July 1977, at approximately 1:15 a.m., after he had parked and locked his car in the sales area of a mobile home sales parking lot which was across the street from the Hawaiian Hut, a bar, Donald approached him with a knife and crescent wrench and demanded his wallet. Perry then saw Dennis standing at the rear of his car holding a two-to-three foot square pipe. When Perry told defendants that he did not have his wallet with him, they demanded that he give them his money. Perry was ordered to empty his pockets and when defendants

saw that he was not carrying any money on him they fled. Perry, enraged, went after them; he caught Donald as he was climbing over a chain link fence and took him over to the Hawaiian Hut and had the police summoned. [4]

Both defendants and the girl who was with them testified. The gist of their testimony was that defendants were helping the girl unpack; it was hot so they went outside and started walking down the street; the girl wanted to see some of the mobile homes so they were wandering through the area when Donald left the other two to go to the service station to go to the bathroom. Perry drove into the parking area, opened the door, called Donald over to the car and propositioned him; Donald pulled out a crescent wrench that he had in his pocket and yelled to Dennis; Dennis ran over and told the girl to get away from there; Dennis hopped over a fence; Perry went after Donald, catching up with him as he started over the fence; following a brief fight Perry escorted Donald to the Hawaiian Hut.

In his notice of decision the referee stated that he was convinced beyond a

reasonable doubt that both minors committed the attempted robbery as charged. He indicated he found Perry's testimony to be plausible whereas he was skeptical of the defendants' theory, stating that "the rather slightly built victim would never have physically pursued and engaged either of these boys in a test of strength unless he was, as he testified, quite enraged. Surely the mere failure of Donald to accept an invitation into his automobile would not have evoked such a reaction."

The evidence gives rise to this conclusion. The referee was not required to believe the defendants' or the [5] girl's testimony. (See People v. Harrison (1969) 1 Cal.App.3d 115, 119.) The determination of the credibility of witnesses and the inferences to be drawn from the evidence are matters within the province of the trier of fact. (Id., at p. 120.) The totality of circumstances in this case supports the conclusions drawn by the referee.

The notice of decision reflects that the referee applied the proper standard of proof. Moreover, we find nothing in the record to support defendants' assertions that the referee was "biased", that

he resolved the matter on the basis of his personal opinion, or that he tried the case according to "the same rules as were employed in circa 1603. . . ."

Defendants contend that the constitutional guarantees of due process and equal protection require the juvenile court judge who rules on the application for rehearing to hear the evidence personally. Defendants concede that this precise contention has been resolved adversely to them. (See, In re Gregory M. (1977) 68 Cal.App.3d 1085, 1093-1094; In re Jay J. (1977) 66 Cal.App. 3d 631, 633-634. See also, In re John H. (1978) 21 Cal.3d 18, 25; In re Edgar M. (1975) 14 Cal.3d 727, 735-736.) We are not persuaded to deviate from the holding of those cases.

Defendants ignore the doctrine of stare decisis when they argue that the standard of appellate review of a juvenile court proceeding, where trial by jury is denied, should be whether guilt is established beyond a reasonable doubt rather [6] than by substantial evidence.

The Supreme Court has held that the principles of appellate review in criminal trials are applicable to the appellate

courts in considering the sufficiency of the evidence admitted in the juvenile proceeding. (In re Dennis B. (1976) 18 Cal. 3d 687, 697; In re Roderick P., supra, 7 Cal.3d at p. 809.) We are bound by the statements of law of the Supreme Court. (People v. Triggs (1973) 8 Cal.3d 884, 890-891; Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455.)

Viewing the evidence in a light most favorable to the judge's findings, as we are required to do (In re Roderick P., supra, 7 Cal.3d at p. 809; see also People v. Reyes (1974) 12 Cal.3d 486, 496-497), we reject defendants' contention that there is insufficient evidence to support the finding that Dennis was guilty of the offense of malicious mischief.

A sergeant of the United States Army Military Police had just driven into the parking lot of Springer's liquor store and was talking to his wife when he saw a person, whom he identified as Dennis, using foul language and kicking the back of a small Ford Pickup truck. When the vehicle pulled away the sergeant saw Dennis turn and kick the door of the liquor store and he saw him "breaking the glass".

The crime of violating Penal Code section 594 (malicious mischief or vandalism) requires the malicious injury to or destruction of real or personal property. The word "maliciously" as used in section 594 imports a wish to vex, annoy or have the intent to do a wrongful act. (Pen. Code, § 7, subd. (4).) Malicious intent is to be presumed from the deliberate commission of an unlawful act. (People v. Kreiling (1968) 259 Cal.App.2d 699, 705.) (1968) 259 Cal.App.2d 699, 705.) It is established by the sergeant's testimony that the glass was broken by Dennis and there is substantial evidence that Dennis' act of kicking the glass door was an act of vandalism. Dennis' suggestion that Springer's liquor store conceivably was operated by a trust of which he was a beneficiary is patently without merit.

The orders of the juvenile court from which Donald and Dennis appeal are affirmed.

REGAN, J.

We concur:

PUGLIA, P.J.

PARAS, J.

APPENDIX B

APPENDIX 'B'

(Text of Memorandum from Juvenile Referee)
[Original page numbers in brackets]

NOTICE OF DECISION

Gentlemen:

[1]The minor, Dennis Delaney, is charged with two counts: (1) malicious mischief by damaging a window belonging to Springer's Liquor Store, and (2) attempted robbery of one Loren Perry.

The Court is convinced that Count 1 was proven beyond a reasonable doubt from the direct testimony of Jeffrey Rinaldi, an Army M.P. who happened to be present when he observed the minor kicking the door of the liquor store and hearing the sound of apparent breaking glass. The circumstantial evidence was clear that the store did not belong to the minor, since it bore the name Springer's Liquor Store, and further it would be highly unreasonable that he would deliberately damage his own property. This evidence was uncontradicted.

Donald Delaney was also charged with the attempted robbery of Loren Perry in the only count charged against this minor. The Court is convinced beyond a reasonable doubt that both minors committed the

attempted robbery as charged in their respective petitions. The victim testified that he observed both minors; Donald being armed with a knife and crescent wrench, and Dennis standing nearby with a piece of pipe. Donald informed the victim that he wanted the victim's wallet, and only after the victim emptied his pockets, revealing only a few coins, did the minors leave. The victim testified that when they left, he pursued them and physically took the younger Donald into custody, dragged him to the nearby Hawaiian Hut and had the authorities called to the scene. The victim had earlier testified that he had parked in the more secluded mobile sales park since he was concerned [2] about his automobile, which he considered to be more or less a collector's item. In corroboration he testified this to be a 1955 Nash Ambassador Country Club Coupe.

The Court could find nothing inherently unreasonable in the testimony of the victim.

In defense, the boys testified that the victim had made homosexual advances to the younger boy. That this led to the older boy, Dennis, intervening between the victim and Donald, ultimately resulting in the

victim apparently becoming enraged by the rejection and taking Dennis forceably into custody. The minors' counsel argued that this reaction may well have resulted from Mr. Perry believing it would protect him from later possible charges of unlawful solicitation for immoral purposes. While, fortunately, the Referee has had little contact with homosexuals, he remains of the opinion that this argument, while ingenious, is totally unconvincing and raises no reasonable doubt.

The testimony of the young lady friend who they called as a witness was marked by at least one substantial inconsistency and, in all, her testimony was of no help to these young boys.

In summary, the Court can see little point in carefully dissecting the testimony of Dennis and Donald. In short, it is the firm opinion of the Court that the rather slightly built victim would never have physically pursued and engaged either of these boys in a test of strength unless he was, as he testified, quite enraged. Surely the mere failure of Donald to accept an invitation into his automobile would not have evoked such a reaction. Assuming

the Hawaiian Hut to be in fact a bar frequented by the gay community, it is the personal opinion of the Court that the minors believed such a person would be "easy pickings", a mistake in judgment which I trust they regret.

A formal order will issue setting the Disposition Hearing.

Very truly yours,

JAMES F. ROACH
Juvenile Referee

APPENDIX C

APPENDIX 'C'

(Text of Petition for Rehearing
In the California State Court of Appeal)
[Original Page Numbers in Brackets]

TO THE HONORABLE ROBERT K. PUGLIA, PRESIDING JUSTICE, AND ASSOCIATE JUSTICES OF THE COURT OF APPEAL, THIRD APPELLATE DISTRICT:

[1]Appellants petition for a rehearing of the court's order of August 8, 1978, on the following grounds:

I

THE COURT'S OPINION EVIDENCES NO CONSIDERATION OF THE MAIN ISSUE PRESENTED BY THE APPELLANT

At page 5 of its opinion the court recites the truism that "The determination of the credibility of witnesses and the inferences to be drawn from the evidence are matters within the province of the trier of fact". Totally ignored by the court is the fact that the referee who heard the evidence was not the trier of fact; the judge was the trier of fact, and he did no more than read the same reporter's transcript to which this court so glibly applies the substantial evidence rule! [2]

The minors' argument to this court was

that where, as here, the decision of a case requires the assessment of the credibility of conflicting witnesses, a reporter's transcript does not provide the judge/trier of fact with sufficient information to assess the credibility of the witnesses. Deprived of such sufficient information, the judge can discharge neither his state constitutional duty to confine the referee to the performance of "subordinate judicial duties" (In re Edgar M. (1975) 14 Cal.3d 727); nor can he make a reliable finding of any fact beyond a reasonable doubt in accord with the requirements of the federal constitution. (In re Winship (1970) 397 U.S. 358.)

It is exactly as three justices of the United States Supreme Court put it a few weeks ago: "[t]rials by transcript can never be more than trials by substantial evidence". (Swisher v. Brady 6/28/78, ___ U.S. ___ [23 Cr.L.Rptr. 3189, 3197].) Trial by substantial evidence is, of course, exactly the way things were done circa 1603, before there was a Bill of Rights to guarantee the right to have one's defense heard and considered. It does not meet the requirements of due

process.

Even if the referee here were empowered to act as a trier of fact, moreover, his open statements to the effect that he was not going to give careful consideration to the minors' defense after reaching the conclusion that the complainant's testimony was not "inherently unreasonable" do indeed reveal that the referee was himself not trying this case according to anything besides the substantial evidence rule. [3]

In our respectful opinion, this reviewing court has a public obligation to use its powers to see to it that cases are not resolved according to unreliable and third-rate methods. That obligation is not discharged when the extensively researched contentions of an appellant regarding a sensitive question of law - acknowledged by the court during argument to be one of first impression - going to the heart of the integrity of the factfinding process, are treated as if they had not been made. Further, the requirements of due process of law (United States Constitution, Amt. XIV) are also violated when an appellant's clearly substantial contentions on appeal are ignored. (Cole v. Arkansas (1948) 333 U.S. 196, 201.)

II

THE COURT'S OPINION MISSTATES CRUCIAL PARTS OF THE EVIDENCE

Among other points advanced on appeal was that it was improper for the referee to have resolved the conflicts in the evidence on the basis of his "personal opinion" that appellants were hostile to homosexuals and considered them "easy pickings" for mugging when such opinion was supported by no evidence.

At page 5 of its opinion, the court states "Moreover, we find nothing in the record to support defendant's assertions that . . . he resolved the matter on the basis of personal opinion. . . ."

This conclusion is belied by what appears at page [4] 2 of the clerk's supplemental transcript on appeal:

". . . it is the personal opinion of the court that the minors believed such a person [i.e., a homosexual] would be 'easy pickings'. . . ." (emphasis added.)

While this court is doubtless possessed of considerable latitude in interpreting the contents of an appellate record, we respectfully submit that the state and federal guarantees of due process of law

(United States Constitution, Amt. XIV) do not permit a reviewing court to reject an appellant's contention by making portions of the record which support it disappear.[1] [5]

CONCLUSION

Taken as a whole, the reasons given by the referee for sustaining this petition do not lead to an inference that this petition was found true by one who was "reasonably persuaded to a genuine certainty". (cf. opinion p. 3); indeed, as we have suggested in our third point on appeal (AOB p. 26 ff.), the evidence does not rise to that level which would permit a reviewer to find that any reasonable trier of fact could have been so convinced if all the evidence were taken into account rather than just that part of it which, in total isolation, supports the judgment.

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1. It was also not "suggested" by Dennis D. that he had a beneficial interest in Springers' liquor store. We were quite careful to say only that there were a number of logical possibilities concerning the ownership of the store, and that it was the People's burden to show that the store was the property of another. This they made no attempt to do.

It is for these reasons that we request the granting of a rehearing, and the correction of a palpable miscarriage of justice.

DATED: August 11, 1978

Respectfully submitted,

QUIN DENVIR
State Public Defender

LAURANCE S. SMITH
Deputy State
Public Defender

Attorneys for Appellants

COPY

Supreme Court, U. S.
FILED
FEB 22 1979
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1978

No. 78-817

DONALD EVERETT D.
DENNIS LOUIS D.,

Petitioners,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA THIRD APPELLATE DISTRICT

BRIEF OF RESPONDENT PEOPLE OF THE STATE OF CALIFORNIA IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1978

No. 78-817

DONALD EVERETT D.
DENNIS LOUIS D.,

Petitioners,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA THIRD APPELLATE DISTRICT

BRIEF OF RESPONDENT PEOPLE OF THE STATE OF CALIFORNIA IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

On August 8, 1978, the Court of Appeal of the State of California, Third Appellate District, affirmed petitioners' convictions in an unpublished opinion. (See Appendix A.)

On September 1, 1978, the above Court of Appeal denied without opinion petitioners' application for rehearing. (See Appendix B.)

On October 4, 1978, the California Supreme Court denied without opinion petitioners' application for hearing. (See Appendix C.)

JURISDICTION

Petitioners assert jurisdiction under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

Does California's standard for appellate review of the sufficiency of evidence supporting an appellant's criminal conviction violate due process of law?

Did the Court of Appeal deny petitioners a full and fair consideration of their appeal?

Does California's scheme of fact finding in juvenile court proceedings violate due process of law?

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are the Sixth Amendment and Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

On July 26, 1977, petitions were filed in the Yolo County Superior Court, sitting as a juvenile court, alleging that petitioners, Donald Everett D. and Dennis Louis D., came within the provisions of section 602 of the California Welfare and Institutions Code (see Appendix D) in that they committed an attempted robbery in violation of sections 664/211 of the California Penal Code (CT 1-2, 22-23).[1/] (See Appendix E.) It was further alleged that Dennis Louis D. committed malicious mischief in violation of section 594 of the California Penal Code (CT 22-23). (See Appendix F.)

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1. CT refers to the Clerk's Transcript on Appeal to the Court of Appeal of the State of California, Third Appellate District, in case number 3 Civil 17296. If the Court so desires, respondent will furnish said transcript upon request.

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On July 27, 1977, counsel having been appointed to represent them, the petitioners were arraigned, and on August 11, 1977, petitioners denied the allegations against them (CT 3, 6, 24, 28).

On August 19, 1977, the jurisdictional hearing commenced before Juvenile Court Referee James F. Roach. Following the testimony of witnesses, the matter was taken under submission (CT 8, 31).

On August 24, 1977, Referee Roach found that each of the allegations was true beyond a reasonable doubt and sustained the petitions (CT 9, 32).

On August 31, 1977, petitioners filed an application for rehearing in the Yolo County Superior Court, pursuant to section 252 of the California Welfare and Institutions Code (CT 11-12, 13). (See Appendix G.)

On September 19, 1977, the Honorable James C. McDermott, Judge of the Yolo County

Superior Court, reviewed the transcript of the proceedings before Referee Roach. Exercising his independent judgment, Judge McDermott found that the evidence proved beyond a reasonable doubt that the petitioners had committed the offenses charged against them. Thus, Judge McDermott denied petitioners' applications for rehearing (CT 14-16, 36-38).

On October 6, 1977, a dispositional hearing was held. The court, having received and considered a probation report and social study, declared Donald Everett D. and Dennis Louis D. wards of the court. Each minor was placed on six months' probation and was committed to the Yolo County Juvenile Hall for two weekends of work programs. As an alternative to the weekend work program, each minor was given the option of participating in 16 hours of volunteer work (CT 19, 42).

On October 26, 1977, petitioners filed timely notices of appeal (CT 20, 43).

On August 8, 1978, following the filing of briefs and oral argument by the respective parties, the Court of Appeal filed its unpublished opinion affirming the judgments. (See Appendix A.)

On September 1, 1978, the Court of Appeal denied petitioners' application for rehearing (see Appendix B), and on October 4, 1978, the California Supreme Court denied without opinion petitioners' application for hearing. (See Appendix C.)

STATEMENT OF FACTS

During the morning hours of June 11, 1977, Jeffrey Rinoldi and his wife drove to Springer's Liquor Store located on West Capitol Avenue in West Sacramento (RT 19, 20).[2/] As Mr. Rinoldi was going into the store to purchase

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2. RT refers to the Reporter's Transcript on Appeal to the Court of Appeal of the State of California, Third Appellate District in case number 3 Civil 17296. If the Court so desires, respondent will furnish said transcript upon request.

several items he heard a commotion outside the store. Upon looking outside he heard Dennis D. "using foul language" and observed Dennis kick the back of a small pickup truck (RT 19). When the truck pulled away, Dennis turned and kicked the glass door of the liquor store, causing the glass to crack and break (RT 19, 20, 21).

Approximately one month later, shortly after midnight on July 24, 1977, Loren Perry drove his 1955 Nash Ambassador Country Club Coupe to the Hawaiian Hut Bar in West Sacramento (RT 5, 6, 10, 11, 18). Because of the "unusual" nature of his car, Mr. Perry chose not to leave it in the bar parking lot so that it would "not be damaged by someone opening [a car door and striking the Nash]" (RT 6, 15-16). Instead, Perry parked the car in a mobilehome dealership parking lot located next door to the Hawaiian Hut (RT 6, 8-9, 10).

After locking his vehicle, Mr. Perry turned and observed Donald D. standing behind

him, holding a knife and a crescent wrench (RT 6-7). Perry then observed Dennis D. standing to the rear of Perry's car, holding a two to three foot long piece of square pipe (RT 7).

Donald stated that he wanted Perry's wallet (RT 7). Perry replied, "You've got to be kidding me," but Donald persisted in his demand (RT 7-8). When Perry indicated that he was not carrying his wallet, Donald stated, "Give us your money," and told Perry to empty his pockets (RT 8). Perry complied by emptying the contents of his pockets -- his car keys and a cigarette -- onto the car (RT 8). Apparently realizing that Perry was not carrying any money, Donald and Dennis then fled from the scene (RT 8-12).

Mr. Perry became "extremely mad," because he didn't "like anybody pulling that kind of thing on [him]" (RT 12). Thus, he chased after the petitioners, following them to a location in the mobilehome lot where they met

with a girl later identified as Bonita Dodge (RT 13, 21-22).

Perry ended the chase when Dennis D. stopped fleeing, turned around, and came back toward Perry while carrying the pipe (RT 13). Perry then retreated to his car to obtain a tool which he apparently intended to use as a weapon (RT 13).

When Dennis D. fled from Perry's sight, Perry heard the sound of someone climbing over the cyclone fence surrounding the mobile-home lot (RT 13). He ran to the fence and observed Ms. Dodge and Donald D. attempting to climb over the fence (RT 13, 42). Perry grabbed the girl causing her to fall from the fence, then shook the fence knocking Donald off balance (RT 13, 42). When Donald dropped one of the weapons, Perry seized it, told Donald to drop the other weapon, and grabbed Donald by the hair (RT 13-14, 42). Perry then seized the second weapon and dragged Donald to the Hawaiian

Hut Bar (RT 13-15, 42).

Perry, who had blood on his hands and face, then threw the weapons he had seized -- the knife and crescent wrench — onto the bar counter and asked someone to call the police (RT 15).

The essence of the defense testimony was as follows: Bonita Dodge had just moved into the neighborhood, and petitioners were helping her unpack (RT 34). It was very hot so they decided to go for a walk (RT 35). Since Bonita wanted to look at mobilehomes, they went to the mobilehome lot next to the Hawaiian Hut (RT 35). Shortly thereafter, Donald D. left Bonita and Dennis to go to a nearby service station to use the restroom (RT 36, 41).

As Donald walked across the parking lot, Mr. Perry drove in, exited his car, and propositioned Donald (RT 41-42). Donald pulled out a crescent wrench he had in his pocket and

called to Dennis for help (RT 42). Dennis ran over, jumped between Donald and Perry, and told Donald and Bonita to "get out of here" (RT 37, 42). After challenging Perry to fight, Donald fled from the scene (RT 37-38).

At this point, Perry went after Donald, caught him at the fence, and, following a brief fight, dragged him to the Hawaiian Hut Bar (RT 42).

SUMMARY OF ARGUMENT

California's standard for appellate review of the sufficiency of evidence supporting an appellant's criminal conviction is comprised of fundamentally fair principles which safeguard an appellant from suffering a criminal conviction which is not supported by substantial evidence. Since California's standard is similar to well established federal law which sets forth the proper rules for appellate review of the sufficiency of evidence, it is clear that California's standard does not violate due

process of law.

Petitioners' contention that the Court of Appeal of the State of California, Third Appellate District, "reconstruct[ed] . . . the record on appeal" and "refus[ed] to recognize the existence of [evidence in the record]" "in order to avoid [one of petitioners' claims of error]" is totally lacking in factual support and is utterly without merit. The record is clear that the Court of Appeal gave petitioners a full and fair consideration of their contentions on appeal.

California's system of fact finding in juvenile court proceedings does not deprive a minor of findings of fact made by a trier of fact which personally saw and heard the testimony of witnesses and the presentation of evidence. Furthermore, petitioners have made no showing that the scheme of fact finding is fundamentally unfair.

ARGUMENT

I

CALIFORNIA'S WELL-ESTABLISHED STANDARD FOR APPELLATE REVIEW OF THE SUFFICIENCY OF EVIDENCE SUPPORTING AN APPELLANT'S CRIMINAL CONVICTION DOES NOT VIOLATE DUE PROCESS OF LAW

Petitioners contend that California's well-established standard for appellate review of the sufficiency of evidence supporting a criminal conviction violates the constitutional guarantee of due process of law. (See Petitioners' Brief, pp. 11-19.) This contention has no merit.

While the term "due process of law" has been "the center of substantial legal debate over the years" (see In re Winship, 397 U.S. 358, 378 (1970) (J. Black, dissenting)), broadly interpreted, "due process of law" means fundamental fairness within our system of laws. See e.g. In re Winship, supra, at 381; Rochin v. California, 342 U.S. 165, 169 (1952). Due process of law protects an individual from

arbitrary action of the government and action which shocks the conscience by failing to comport with traditional ideas of fair play and decency. See e.g. Meachum v. Fano, 427 U.S. 215, 226 (1976); Breithaupt v. Abram, 352 U.S. 432, 435 (1957).

It is well settled that due process of law requires that, in the trial court, guilt of a criminal charge must be established by proof beyond a reasonable doubt. In re Winship, supra, 397 U.S. at 361-365.

However, once the trier of fact has made its determination of guilt beyond a reasonable doubt, due process of law does not require the reviewing court to impose its own interpretation of what evidence constitutes guilt beyond a reasonable doubt. To the contrary, it is well settled that to render a criminal conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment, the conviction must be "totally devoid of

evidentiary support." Garner v. Louisiana, 368 U.S. 157, 163 (1961). As stated by Chief Justice Warren, this Court's due process of law inquiry does not turn on a question of the sufficiency of evidence to support the conviction, but on whether the conviction rests upon any evidence which would support the finding of guilt. Id. at 163-164; see also Shuttlesworth v. Birmingham, 382 U.S. 87, 94-95 (1965); Thompson v. Louisville, 362 U.S. 199, 204, 206 (1960).

This appellate rule for reviewing the sufficiency for evidence is mandated by the basic element of our system of criminal justice -- the determination of the guilt or innocence of a person accused of a criminal offense is the exclusive province of the trier of fact, which is vested with the duty to assess the credibility of witnesses, determine factual conflicts, and render its determination beyond

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a reasonable doubt. Kotteakos v. United States, 328 U.S. 750, 763-764 (1946); Lloyd v. United States, 226 F.2d 9, 13 (5th Cir. 1955); Bridgman v. United States, 183 F.2d 750, 756 (9th Cir. 1950).

To ask, as suggested by petitioners, that the reviewing court interject its own interpretation of what constitutes guilt beyond a reasonable doubt would, in essence, require the court to reweigh the evidence and redetermine guilt or innocence. Such a result would be contrary to the fundamental principle that "[i]t is not for [a reviewing] court to re-evaluate the evidence, or substitute [its] judgment for that of the [trier of fact]." Sandez v. United States, 239 F.2d 239, 243 (9th Cir. 1956); see also Kotteakos v. United States, supra, 328 U.S. at 763; United States v. Brown, 335 F.2d 170, 172 (2d Cir. 1964);

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United States v. Randall, 164 F.2d 284, 286-287 (7th Cir. 1947).[3]

With these rules in mind, it is clear that California's standard of appellate review of the sufficiency of evidence supporting a criminal conviction (hereinafter referred to as the "substantial evidence rule") does not violate due process of law.

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3. Even the petitioners themselves have noted the propriety of and necessity for California's standard for appellate review of the sufficiency of evidence supporting a criminal conviction. In their "Appellants' Opening Brief," filed on February 9, 1978, in the Court of Appeal of the State of California, Third Appellate District, petitioners stated,

> "The substantial evidence rule may well be justified in cases which are tried to a jury . . . The purpose of the jury is to serve as a buffer between the state and the individual whose life or liberty is at stake. If judges were empowered to overturn verdicts supported by substantial evidence because they merely disagreed with them, the jury would be converted into a mere fixture. Preservation of the jury's impartial role thus requires something akin to the substantial evidence rule." (See Appendix J at p. 31.)

In reviewing the sufficiency of evidence, a California appellate court "must determine whether a reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt." People v. Reyes, 12 Cal.3d 486, 496 (1974). In making that determination the reviewing court does not perform the function of reweighing the evidence, reappraising the credibility of witnesses, or redetermining factual conflicts, for those functions are within the province of the trier of fact. People v. Culver, 10 Cal.3d 542, 548 (1973); People v. DePaula, 43 Cal.2d 643, 649 (1954); People v. Avina, 264 Cal.App.2d 143, 147 (1968). Instead, the court "must view the evidence in the light most favorable to the People and presume in support of that judgment the existence of every fact the trier could reasonably deduce from the

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evidence." People v. Vann, 12 Cal.3d 220, 225 (1974); People v. Redmond, 71 Cal.2d 745, 755 (1969). However, an appellate court will not uphold a verdict based upon evidence inherently improbable and thus may reject evidence believed by the trier of fact if there exists either a physical impossibility that it is true or the falsity of the evidence is apparent without resorting to inferences or deductions. People v. Mayberry, 15 Cal.3d 143, 150 (1975). Simply stated, the test for reviewing the sufficiency of evidence "is whether there is substantial evidence to support the conclusion of the trier of fact." People v. Vann, supra, 12 Cal.3d at 225; People v. Culver, supra, 10 Cal.3d at 548. To be considered substantial evidence within the aforementioned test, the evidence "must be of the type which 'reasonably inspires confidence and is "of solid value."'" People v. Reyes, supra, 12 Cal.3d at 497.

As set forth above, California's

substantial evidence rule is comprised of fundamentally fair principles which safeguard an appellant from suffering a criminal conviction which is not supported by substantial evidence. Surely it cannot be said that the substantial evidence rule shocks the conscience or violates traditional rules of fair play and decency.

In fact, California's substantial evidence rule is remarkably similar to the federal rule enunciated by this Court as the proper rule for appellate review of the sufficiency of evidence supporting a criminal conviction. "It is not for [a federal appellate court] to weigh the evidence or to determine the credibility of witnesses." Glasser v. United States, 315 U.S. 66, 80 (1942). The reviewing court "must sustain the verdict if there is substantial evidence, viewed in the light most favorable to the Government, to uphold the

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jury's decision." Burks v. United States, 437 U.S. 1, 17 (1978); Hamling v. United States, 418 U.S. 87, 124 (1974); Glasser v. United States, supra, at 80. Reversal on the ground of insufficient evidence will be confined to cases where the prosecution's failure to establish guilt "is clear." Burks v. United States, supra, at 17.

In summary, this Court's holdings in Garner, Shuttlesworth, Thompson, Burks, Hamling, and Glasser, and the other cases cited above, can only be interpreted to hold that California's substantial evidence rule does not violate due process of law.[4/]

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4. Respondent also notes that this Court has recently denied petitions for certiorari in Stewart v. California, No. 78-5589, cert. denied Jan. 22, 1979, ___ U.S. ___ (1979), and Freeman v. Zahradnick, No. 75-6898, cert. denied Feb. 22, 1977, 429 U.S. 1111 (1977), cases which raised the identical issue now raised by petitioners.

II

THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT, GAVE PETITIONERS A FULL AND FAIR CONSIDERATION OF THEIR CONTENTIONS ON APPEAL

Petitioners contend that the Court of Appeal of the State of California, Third Appellate District, [hereinafter referred to as the Court of Appeal] "reconstruct[ed] . . . the record on appeal" and "refus[ed] to recognize the existence of [evidence in the record]" "in order to avoid [one of petitioners' claims of error]." Thus, petitioners claim that the Court of Appeal violated due process by denying them a full and fair consideration of their contentions on appeal. (See Petitioners' Brief, pp. 20-24.)

This contention has no basis in fact and is utterly without merit.

In their "Appellants' Opening Brief" filed in the Court of Appeal, petitioners argued that the "juvenile court . . . deserve[d] to be sharply rebuked for the sloppy and shoddy manner

in which it . . . approached the task of fact-finding," and that the juvenile court referee decided the case "on the basis of nothing more that (sic) rank speculations and prejudice." (See Appendix J at pp. 7-10, 11, 12.)

In arguing that the referee based his findings on "personal opinion" rather than evidence produced at trial, petitioners' counsel referred to the following statement made by the referee in his "Notice of Decision": "[I]t is the personal opinion of the Court that the [petitioners] believed that ['the slightly built victim'] would be 'easy pickings,' a mistake in judgment which I trust they regret." (See Petitioners' Brief, Appendix B at pp. 42-43.)

It is well settled that a trier of fact has the right and duty to render opinions based upon inferences fairly drawn from a consideration of the evidence produced at trial.

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See e.g. Keating v. Superior Court, 45 Cal.2d 440, 444 (1955); Fishbaugh v. Fishbaugh, 15 Cal.2d 445, 456, 457 (1940); In re Morelli, 11 Cal.App.3d 819, 843-844, fn. 16 (1970); Taliaferro v. Taliaferro, 203 Cal.App.2d 642, 648 (1962).

In rendering the aforementioned opinion regarding the apparent motive for the crime, Referee Roach noted, among other things, that the victim was of slight build and that the petitioners alleged that, at the time of the incident, the victim was enroute to a homosexual bar. Considering the totality of the evidence, the referee's opinion as to motive constituted nothing more than a proper inference which reasonably could be made from the evidence.

Contrary to petitioners' suggestion, the referee's statement concerning motive does not give rise to any inference that Referee Roach was biased against petitioners or

resolved the matter on the basis of personal opinion rather than on a consideration of the evidence. Instead, it is clear that in rendering his judgment Referee Roach carefully considered all the testimony produced at trial, appraised the credibility of witnesses, and weighed the reasonableness of the witnesses' conflicting statements. Thus, the Court of Appeal correctly concluded that there is "nothing in the record to support defendants' assertions that the referee was 'biased,' that he resolved the matter on the basis of his personal opinions, or that he tried the case according to 'the same rules as were employed in circa 1603. . . .'" (See Appendix A.)

Accordingly, in rejecting petitioners' contention, the Court of Appeal did not violate due process of law.

III

CALIFORNIA'S SCHEME OF FACT FINDING IN JUVENILE COURT PROCEEDINGS DOES NOT VIOLATE DUE PROCESS OF LAW

After the filing of two juvenile court petitions alleging that petitioners had committed attempted robbery and that petitioner Dennis Louis D. had committed malicious mischief (CT 1-2, 22-23), petitioners were tried in a hearing before a juvenile court referee (CT 8, 31). Following the testimony of witnesses and argument by counsel, the referee found, beyond a reasonable doubt, that the allegations set forth in the petitions were true (CT 9, 32; RT 1-52; Petitioners' Brief, Appendix B).

Thereafter, petitioners filed an application for rehearing before the Honorable James C. McDermott, Judge of the Yolo County Superior Court, sitting as a juvenile court, seeking a de novo hearing on the aforesaid petitions (CT 11-12). Judge McDermott read and considered the entire transcript of the

proceedings before the referee, reviewed the points raised by each petitioner, and, exercising his independent judgment, found that the evidence showed, beyond a reasonable doubt, that petitioners had committed the offenses as alleged (CT 36-38). Thus, Judge McDermott adopted the referee's determinations and denied petitioners' application for rehearing. In re Edgar M., 14 Cal.3d 727, 735-736 (1975).

Although not entirely clear from their brief, petitioners appear to contend that this system of fact finding denied them due process of law, because the juvenile court judge -- who petitioners perceive as the "trier of fact" -- based his "decision" on a transcript of the proceedings heard before the referee rather than on evidence personally heard before the judge. Therefore, petitioners claim that the finding of petitioners' "guilt" was made by a court which did not personally see or hear the witnesses testify. (See Petitioners' Brief at

pp. 25-31.)

Petitioners' contention is based upon a mischaracterization of California's juvenile court system.

Under the circumstances of the case at bench -- i.e. a case tried before a referee, in which a judge thereafter denies a petition for rehearing — it is the referee, not the judge (as claimed by petitioners), who is, in essence, the trier of fact.

As noted by California decisional law, when a judge considers a minor's application for rehearing, the judge reviews the proceedings before the referee and exercises his (the judge's) independent judgment to either (1) grant a de novo trial, or (2) deny the application for rehearing. In re Edgar M., supra, 14 Cal.3d at 735-736; In re Jay J., 66 Cal.App.3d 631, 634 (1977). In denying an application for rehearing, the judge "adopt[s] the referee's determinations as those of the court. . . ."

In re Edgar M., supra, 14 Cal.3d at 735-736. Stated in another way, the judge adopts findings of fact made by a trier of fact (the referee) who saw and heard the evidence presented.

Under these circumstances, it is apparent that the juvenile court referee was the trier of fact. Had petitioners not sought a rehearing from the judge, the referee's order would have been final. Accordingly, the judge's action in the case at bench denying petitioners' application for rehearing and adopting the referee's determinations did not deprive petitioners of findings of fact made by a trier of fact which personally saw and heard the testimony of witnesses and the presentation of evidence.

California's scheme of fact finding in juvenile court proceedings does not violate the requirements of due process of law. It is well settled that the applicable due process standard in juvenile proceedings is fundamental

fairness. See e.g. McKeiver v. Pennsylvania, 403 U.S. 528, 543 (1971). In addition, procedural due process does not dictate a particular form of tribunal. The requirement is only that of "A fair trial in a fair tribunal. . . ." In re Murchison, 349 U.S. 133, 136 (1955).

Petitioners have made no showing that fundamental unfairness is injected by California's process in which a referee first finds facts based upon his view of live witnesses with review by the judge limited to an examination of the record of the proceedings before the referee, unless the judge determines to grant a de novo hearing. In re Jay J., supra, 66 Cal.App.3d at 634. In reality, the procedure afforded petitioners two chances prior to appellate review to have the evidence examined and to urge that the allegations of the petition were not proved beyond a reasonable doubt.

Furthermore, petitioners have made no showing that findings of fact made by a referee,

instead of a judge, are fundamentally unfair. The person holding the title of judge is no more or less a human being than the person holding the position of a juvenile court referee. Since 1971, the qualifications for appointment of a juvenile court referee are essentially the same as those of a municipal court judge. (Welf. & Inst. Code, § 247; Cal. Const., art. 6, § 15 (see Appendix H).) In fact, California law provides that the referee, in hearing cases assigned to him, exercises the "same powers as a judge of the juvenile court." (Welf. & Inst. Code, § 248 (see Appendix I).) Thus, the human being and not the title finds the facts; and there is no basis for assuming that fact finding by one human being (the referee) will be less fair than fact finding by another with equal qualifications (the judge) simply because each bears a different title or holds a different office. In re Jay J., supra, 66 Cal.App.3d at 634.

In summary, petitioners have made no substantial claim that California's juvenile court fact finding procedure in unfair or that the referee's determination which was adopted by the juvenile court judge was the result of anything other than an independent, neutral, and detached judgment. Cf. North v. Russell, 427 U.S. 328, 337 (1976). Thus, petitioners' contention that the system denied them due process of law must fail.

Finally, respondent submits that to adopt petitioners' argument and require every finding of fact to be made by a judge who personally sees and hears the presentation of evidence would, in effect, nullify the juvenile court referee system, a system which has historically been viewed as an important and necessary part of our system of juvenile

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justice. Cf. Swisher v. Brady, ___ U.S. ___, 98 S.Ct. 2699, 2715 (1978) (J. Marshall, dissenting).[5/]

CONCLUSION

For the foregoing reasons, it is respectfully requested that the instant application for writ of certiorari be denied.

Respectfully submitted,

GEORGE DEUKMEJIAN, Attorney General
of the State of California
JACK R. WINKLER, Chief Assistant
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5. Respondent notes that this Court has recently denied petitions for certiorari in Fimbres v. California, No. 76-6075, cert. denied May 2, 1977, 431 U.S. 905 (1977), and Stewart v. California, No. 78-5589, cert. denied Jan. 22, 1979, ___ U.S. ___ (1979), cases which raised the identical issue now raised by petitioners.

APPENDIX A

APPENDIX A

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

77DA0809
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COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE THIRD APPELLATE DISTRICT

[Yolo]

In re DONALD D., and DENNIS D., Persons Coming Under the Juvenile Court Law.	3 Civil 17296 (Super.Ct. Nos. 6657 & 6658)
THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DONALD D., and DENNIS D., Defendants and Appellants.	FILED AUG - 8 1978 COURT OF APPEAL - 3RD DISTRICT WILFRED J. KRAMER, Clerk By _____, Deputy

Pursuant to Welfare and Institutions Code section 602 separate petitions were filed in juvenile court charging each of the minor brothers, Donald, 15 years of age, and Dennis, 16-years-old, with attempted robbery by means of force and fear. (Pen.Code, §§ 211, 664.) Dennis additionally was charged with malicious mischief. (Pen. Code, § 594.) The petitions were heard by a referee who found the allegations sustained beyond a reasonable doubt and Donald and Dennis to be persons described in section 602. Defendants' application for rehearing was denied. Following the disposition hearing, Donald was placed on six months' probation under the supervision

of the probation officer; Dennis was declared a ward of the court and placed him in the custody of his parents and was ordered to make restitution in the amount of $75.16; in addition both Donald and Dennis were ordered to participate in the juvenile hall work program for 16 hours or for two weekends. Both minors appeal from the "judgment."

The minors contend they were deprived of a fair hearing guaranteed by the due process clause of the constitution. They assert the referee was biased and determined their guilt on speculation and his personal opinion, which, in effect, resulted in the application of the substantial evidence standard of proof rather than the reasonable doubt standard.

We have reviewed the record, including the comments of the referee and his notice of decision and find the minors' assertions that he was biased and that he approached his task of fact-finding in a "sloppy and shoddy manner" to be totally unfounded.

California courts have applied the reasonable doubt standard since the United States Supreme Court in In re Winship (1970) 397 U.S. 358, 377-378 [25 L.Ed.2d 368, 382-383] held that juveniles, like adults, were constitutionally entitled under the due process clause to proof beyond a reasonable doubt at the adjudicatory stage when they are charged with an act which would constitute a crime if committed by an adult. (In re Roderick P. (1972) 7 Cal.3d 801, 809;

Richard M. v. Superior Court (1971) 4 Cal.3d 370, 378.)

Reasonable doubt is defined as not a mere possible doubt. "It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge." (Pen. Code, § 1096; People v. Miller (1916) 171 Cal. 649, 652.) Thus to justify a criminal conviction the trier of fact must be reasonably persuaded to a genuine certainty. (People v. Hall (1964) 62 Cal.2d 104, 112; People v. Garcia (1975) 54 Cal.App.3d 61, 66-67.)

Here Loren Perry testified that in July 1977, at approximately 1:15 a.m., after he had parked and locked his car in the sales area of a mobile home sales parking lot which was across the street from the Hawaiian Hut, a bar, Donald approached him with a knife and crescent wrench and demanded his wallet. Perry then saw Dennis standing at the rear of his car holding a two-to-three foot square pipe. When Perry told defendants that he did not have his wallet with him, they demanded that he give them his money. Perry was ordered to empty his pockets and when defendants saw that he was not carrying any money on him they fled. Perry, enraged, went after them; he caught Donald as he was climbing over a chain link fence and took him over to the Hawaiian Hut and had the police summoned.

Both defendants and the girl who was with them testified. The gist of their testimony was that defendants were helping the girl unpack; it was hot so they went outside and started walking down the street; the girl wanted to see some of the mobile homes so they were wandering through the area when Donald left the other two to go to the service station to go to the bathroom. Perry drove into the parking area, opened the door, called Donald over to the car and propositioned him; Donald pulled out a crescent wrench that he had in his pocket and yelled to Dennis; Dennis ran over and told Donald and the girl to get away from there; Dennis hopped over a fence; Perry went after Donald, catching up with him as he started over the fence; following a brief fight Perry escorted Donald to the Hawaiian Hut.

In his notice of decision the referee stated that he was convinced beyond a reasonable doubt that both minors committed the attempted robbery as charged. He indicated he found Perry's testimony to be plausible whereas he was skeptical of the defendants' theory, stating that "the rather slightly built victim would never have physically pursued and engaged either of these boys in a test of strength unless he was, as he testified, quite enraged. Surely the mere failure of Donald to accept an invitation into his automobile would not have evoked such a reaction."

The evidence gives rise to this conclusion. The referee was not required to believe the defendants' or the

girl's testimony. (See People v. Harrison (1969) 1 Cal.App.3d 115, 119.) The determination of the credibility of witnesses and the inferences to be drawn from the evidence are matters within the province of the trier of fact. (Id., at p. 120.) The totality of circumstances in this case supports the conclusions drawn by the referee.

The notice of decision reflects that the referee applied the proper standard of proof. Moreover, we find nothing in the record to support defendants' assertions that the referee was "biased," that he resolved the matter on the basis of his personal opinion, or that he tried the case according to "the same rules as were employed in circa 1603. . . ."

Defendants contend that the constitutional guarantees of due process and equal protection require the juvenile court judge who rules on the application for rehearing to hear the evidence personally. Defendants concede that this precise contention has been resolved adversely to them. (See, In re Gregory M. (1977) 68 Cal.App.3d 1085, 1093-1094; In re Jay J. (1977) 66 Cal.App.3d 631, 633-634. See also, In re John H. (1978) 21 Cal.3d 18, 25; In re Edgar M. (1975) 14 Cal.3d 727, 735-736.) We are not persuaded to deviate from the holding of those cases.

Defendants ignore the doctrine of stare decisis when they argue that the standard of appellate review of a juvenile court proceeding, where trial by jury is denied, should be whether guilt is established beyond a reasonable doubt rather

than by substantial evidence.

The Supreme Court has held that the principles of appellate review in criminal trials are applicable to the appellate courts in considering the sufficiency of the evidence admitted in the juvenile proceeding. (In re Dennis B. (1976) 18 Cal.3d 687, 697; In re Roderick P., supra, 7 Cal.3d at p. 809.) We are bound by the statements of law of the Supreme Court. (People v. Triggs (1973) 8 Cal.3d 884, 890-891; Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455.)

Viewing the evidence in a light most favorable to the judge's findings, as we are required to do (In re Roderick P., supra, 7 Cal.3d at p. 809; see also People v. Reyes (1974) 12 Cal.3d 486, 496-497), we reject defendants' contention that there is insufficient evidence to support the finding that Dennis was guilty of the offense of malicious mischief.

A sergeant of the United States Army Military Police had just driven into the parking lot of Springer's liquor store and was talking to his wife when he saw a person, whom he identified as Dennis, using foul language and kicking the back of a small Ford pickup truck. When the vehicle pulled away the sergeant saw Dennis turn and kick the door of the liquor store and he saw him "breaking the glass."

The crime of violating Penal Code section 594 (malicious mischief or vandalism) requires the malicious

injury to or destruction of real or personal property. The word "maliciously" as used in section 594 imports a wish to vex, annoy or have the intent to do a wrongful act. (Pen. Code, § 7, subd. (4).) Malicious intent is to be presumed from the deliberate commission of an unlawful act. (People v. Kreiling (1968) 259 Cal.App.2d 699, 705.) It is established by the sergeant's testimony that the glass was broken by Dennis and there is substantial evidence that Dennis' act of kicking the glass door was an act of vandalism. Dennis' suggestion that Springer's liquor store conceivably was operated by a trust of which he was a beneficiary is patently without merit.

The orders of the juvenile court from which Donald and Dennis appeal are affirmed.

REGAN, J.

We concur:

PUGLIA, P.J.

PARAS, J.

APPENDIX B

APPENDIX B

IN THE

Court of Appeal of the State of Califor

IN AND FOR THE

THIRD APPELLATE DISTRICT

ASSIGNED CRIM.
DOCKET #
SEND TO:
70A0809

In re DONALD EVERETT DELANEY and DENNIS LOUIS DELANEY, Persons Coming Under the Juvenile Court Law.

3 Civil 17296

Yolo 6657

PEOPLE OF THE STATE OF CALIFORNIA

v.

DONALD EVERETT DELANEY and DENNIS LOUIS DELANEY

DOCKETED
SACRAMENTO
No. 70A0809
DEP 9-5 By

By the Court:

Appellants' petition for rehearing is denied.

Dated: September 1, 1978.

PUGLIA, P. J.

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cc: G. Michael Gates
Deputy Attorney General

cc: Laurance S. Smith
Deputy State Public Defender

FILED
SEP 1 - 1978
COURT OF APPEAL - 3RD DISTRICT
WILFRIED J. KRAMER, Clerk
By _____, Deputy

APPENDIX C

APPENDIX C

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

OCT 4 1978

DOCKETED
SAC. APP. INTO
77DA0809
DATE 10-10

I have this day filed Order

HEARING DENIED

In re: 3 Civil *No.* 17296
IN RE DONALD D., ET AL
People

vs.

Delaney et al

ASSIGNED CRIM. 1,
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77DA0809

G. E. BISHEL
Clerk

88322-877 10-77 3M OBP

APPENDIX D

APPENDIX D

CALIFORNIA WELFARE & INSTITUTIONS CODE

§ 602. Minors violating laws defining crime; minors failing to obey court order

Any person who is under the age of 18 years when he violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime * * * other than an ordinance establishing a curfew based solely on age, is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court.

(Amended by Stats.1972, c. 84, p. 100, § 1, urgency, eff. May 19, 1972; Stats.1976, c. 1071, p. —, § 12.)

APPENDIX E

APPENDIX E

CALIFORNIA PENAL CODE

§ 211. Definition

ROBBERY DEFINED. Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear. (Enacted 1872.)

§ 664. [Punishments for attempts]

Every person who attempts to commit any crime, but fails, or is prevented or intercepted in the perpetration thereof, is punishable, where no provision is made by law for the punishment of such attempts, as follows:

1. If the offense so attempted is punishable by imprisonment in the state prison, the person guilty of such attempt is punishable by imprisonment in the state prison for one-half the term of imprisonment prescribed upon a conviction of the offense so attempted; provided, however, that if the crime attempted is one in which the maximum sentence is life imprisonment or death the person guilty of such attempt shall be punishable by imprisonment in the state prison for a term of five, six or seven years.

2. If the offense so attempted is punishable by imprisonment in a county jail, the person guilty of such attempt is punishable by imprisonment in a county jail for a term not exceeding one-half the term of imprisonment prescribed upon a conviction of the offense so attempted.

3. If the offense so attempted is punishable by a fine, the offender convicted of such attempt is punishable by a fine not exceeding one-half the largest fine which may be imposed upon a conviction of the offense so attempted.

Amended Stats 1976 ch 1139 § 265, operative July 1, 1977; Stats 1977 ch 165 § 12, effective June 29, 1977, operative July 1, 1977.

APPENDIX F

APPENDIX F

CALIFORNIA PENAL CODE

TITLE 14. MALICIOUS MISCHIEF

§ 594. [Vandalism: Penalty]

(a) Every person who maliciously injures or destroys any real or personal property not his own, in cases otherwise than those specified in this code, is guilty of vandalism.

(b) If the amount of injury or destruction is one thousand dollars ($1,000) or more, vandalism is punishable by (1) imprisonment for six months in the county jail, a fine of five hundred dollars ($500), or both or (2) imprisonment in the state prison not to exceed one year and one day, a fine of one thousand dollars ($1,000), or both such fine and imprisonment.

(c) If the amount of injury or destruction is less than one thousand dollars ($1,000), vandalism is punishable by imprisonment in the county jail for not more than six months, or by a fine of not more than five hundred dollars ($500), or by both such fine and imprisonment.

APPENDIX G

APPENDIX G

CALIFORNIA WELFARE & INSTITUTIONS CODE

§ 252. Rehearing; application

At any time prior to the expiration of 10 days after service of a written copy of the order and findings of a referee, a minor or his parent or guardian may apply to the juvenile court for a rehearing. Such application may be directed to all or to any specified part of the order or findings, and shall contain a statement of the reasons such rehearing is requested. If all of the proceedings before the referee have been taken down by an official reporter, the judge of the juvenile court may, after reading the transcript of such proceedings, grant or deny such application. If proceedings before the referee have not been taken down by an official reporter, such application shall be granted as of right. If an application for rehearing is not granted within 20 days following the date of its receipt, it shall be deemed denied. However, the court, for good cause, may extend such period beyond 20 days, but not in any event beyond 45 days, following the date of receipt of the application, at which time the application for rehearing shall be deemed denied unless it is granted within such period.

(Added by Stats.1976, c. 1068, p. —, § 4.)

APPENDIX H

APPENDIX H

CALIFORNIA WELFARE & INSTITUTIONS CODE

§ 247. Referees; appointment; term; compensation; qualifications

The judge of the juvenile court, or in counties having more than one judge of the juvenile court, the presiding judge of the juvenile court or the senior judge if there is no presiding judge, may appoint one or more referees to serve on a full-time or part-time basis. A referee shall serve at the pleasure of the appointing judge, and unless the appointing judge makes his order terminating the appointment of a referee, such referee shall continue to serve as such until the appointment of his successor. Except as otherwise provided by law, the amount and rate of compensation to be paid referees shall be fixed by the board of supervisors. Every referee first appointed on or after * * * January 1, 1977, shall have been admitted to practice law in this state and, in addition, shall have been admitted to practice law in this state for a period of not less than five years or in any other state and this state for a combined period of not less than 10 years. Nothing in this section shall be construed to apply to the qualifications of any referee first appointed prior to * * * January 1, 1977.

(Added by Stats.1976, c. 1068, p. —, § 4. Amended by Stats.1977, c. 910, p. —, § 3.)

CALIFORNIA CONSTITUTION

ART. VI, § 15

§ 15. [Eligibility of judges]

A person is ineligible to be a judge of a court of record unless for 5 years immediately preceding selection to a municipal court or 10 years immediately preceding selection to other courts, the person has been a member of the State Bar or served as a judge of a court of record in this State. A judge eligible for municipal court service may be assigned by the Chief Justice to serve on any court.

Amended November 5, 1974.

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CALIFORNIA WELFARE & INSTITUTIONS CODE

§ 248. Hearing assigned cases; findings and order; right of review; service

A referee shall hear such cases as are assigned to him by the presiding judge of the juvenile court, with the same powers as a judge of the juvenile court. A referee shall promptly furnish to the presiding judge of the juvenile court and the minor, if the minor is 14 or more years of age or if younger has so requested, and shall serve upon the minor's attorney of record and the minor's parent or guardian or adult relative and the attorney of record for the minor's parent or guardian or adult relative a written copy of his findings and order and shall also furnish to the minor, if the minor is 14 or more years of age or if younger has so requested, and to the parent or guardian or adult relative, with the findings and order, a written explanation of the right of such persons to seek review of the order by the juvenile court. Service, as provided in this section, shall be by mail to the last known address of such persons or to the address designated by such persons appearing at the hearing before the referee.
(Added by Stats.1976, c. 1068, p. —, § 4.)

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COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DONALD EVERETT DELANEY and DENNIS LOUIS DELANEY, Minors.	)	3 Civil ~~[illegible]~~

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF YOLO, SITTING AS A JUVENILE COURT

Honorable James C. McDermott, Judge

APPELLANT'S OPENING BRIEF

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COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DONALD EVERETT DELANEY and DENNIS LOUIS DELANEY, Minors.	)	3 Civil 197296

APPELLANT'S OPENING BRIEF

STATEMENT OF THE CASE

This is an appeal from orders of the Superior Court for Yolo County, sitting as a Juvenile Court, which sustained petitions alleging that Dennis and Donald Delaney were persons described by section 602 of the Welfare and Institutions Code.

Proceedings leading to these orders were commenced on July 25, 1977. The District Attorney filed petitions alleging that Donald Delaney was guilty of an attempted robbery on July 24, 1977 (CT 1-2)[1]; and that Dennis Delaney was guilty of the same attempted robbery, as well as malicious mischief for having allegedly broken a pane of glass in the front door of a West Sacramento liquor store. (CT 22-23.)

A detention hearing was conducted on July 27,

1. "CT" refers to Clerk's Transcript on appeal.

1977. Both defendants were ordered placed on pretrial home supervision pursuant to Welfare & Institutions Code section 628.1. (CT 3, 24.)

On August 19, 1977, trial was held before James Roach, a Juvenile Court referee. The referee took the matter under submission following the close of testimony on August 19. (CT 8, 31.) On August 24, a written decision was filed by the referee in which both petitions were declared to be true. (CT 9, 32.)

On August 31, 1977, both minors filed petitions for rehearing of the referee's findings pursuant to Welfare & Institutions Code section 252. (CT 11-12.) The petitions were denied on September 19, 1977 by Judge James C. McDermott, who, in doing so, recited that he had reweighed the evidence as presented within the written transcript of testimony, and had decided the case on the basis of his independent judgment. (CT 14-15.)

On October 16, 1977, a disposition hearing was held, at which both minors were ordered committed to a two-weekend work program at Juvenile Hall and placed on probation. (CT 19, 42.)

Timely notices of appeal were filed by both minors on October 28, 1977. (CT 20, 43.)

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STATEMENT OF THE FACTS

1. The Attempted Robbery Charge Against Donald And Dennis

In the late evening hours of July 24, 1977, Loren Perry drove into the dimly-lit sales lot of a West Sacramento mobile home park. (RT 6.)[2] This lot was adjacent to the Hawaiian Hut (RT 10), a local bar known as a hangout for homosexuals. (RT 35, 43.)[3]

Though he indicated he planned to go into the Hawaiian Hut (RT 10), Perry was carrying no wallet and had only fifty-five cents in his possession. (RT 8:2, 14.) He stated that he parked in the mobile home lot instead of the Hawaiian Hut's lot because he did not want the 1955 Nash he was driving (RT 20) to be damaged. (RT 6, 16.)

According to Perry, when he got out of his car, he noticed Donald Delaney, the younger of the two boys, standing there holding a knife and a crescent wrench. (RT 6-7.)

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2. "RT" refers to the Reporter's Transcript on appeal.

3. The reputation of this establishment, as well as that of the complainant, might be inferred from the following exchange between the District Attorney and Donald Delaney, which the prosecutor thought necessary to show a "motive":

Q: What do you think of homosexuals?

A: I don't really like them. It's their thing, I guess, but . . . .

Q: You don't like them?

A: Well, it's not that. I don't really know them.

Q: Do you think of them as being sissies?

A: No, I don't. (RT 43-44; see also Clerk's Supp. Transcript, 2.)

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The elder boy, Dennis, was said to be standing at the rear of the car holding a "square pipe". Donald then allegedly demanded Perry's wallet. Perry said he then emptied his pockets; and, when it was established he had only some keys and an old cigarette butt in his back pocket, the two boys fled. (RT 8.)

Though Perry was not frightened by the incident (RT 13), the referee gratuitously concluded that he "must have been quite enraged". (Clerk's Supp. Transcript, 2.)

According to Donald Delaney, when Perry pulled up into the middle of the sales lot, he called "come here"; and then said, "Why don't you get in my car and I'll show you my place." (RT 41.)[4] Frightened, Donald backed away while removing a crescent wrench from his pocket. He called to his older brother for help, and retreated to where the group had been standing. (RT 42.)

Bonita Dodge was a neighbor of the Delaneys in their trailer park. Earlier that evening, the two boys had dropped by her trailer and suggested going for a walk. (RT 24.) They did so, and proceeded to walk into the sales lot. (RT 22.) At one point, Donald stated that he was going to go over to an adjoining gas station to use the restroom. As he was leaving to do so, a man pulled up and got out of his car. (RT 23.)

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4. The referee appeared, incredibly, to be skeptical as to whether these remarks, phrased in the studied manner of those who have learned that circumspection is a way to avoid arrest for sexual solicitation, could be interpreted as a sexual "proposition".

The next thing, Donald was calling for Dennis. (RT 24.) He sounded both worried and scared. (RT 26.) She ascertained from Donald a few moments later that he had called for help because Perry had "propositioned" him.

When Donald called for help, Dennis responded to observe Perry advancing toward Donald. Donald appeared to be scared, and Dennis jumped between them. Thinking that Perry had "done something" to his brother, Dennis stated to Perry that he "would have to fight me first before he fought my brother." (RT 37.)

Dennis ran back and told Miss Dodge ("Bunny") to leave. Perry continued his advance, and Dennis tried to evade him by climbing a fence. He did not participate in any attempt to take money from Perry. (RT 38.)

Donald also tried to evade Perry by going over a fence. Perry caught up with him, grabbed him by the hair, and dragged him into the Hawaiian Hut. Once inside, Perry and some other men threatened "to take me over to the river and cut my throat." (RT 42.)

After the police arrived, Donald tried to tell them what had happened; he was told to "shut up". (RT 47.)

After the conclusion of all testimony, the referee instructed the bailiff to inform "the so-called victim" that he was free to leave. (RT 48.)

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2. The Malicious Mischief Charge Against Dennis

On June 11, 1977, Jeffrey Rinoldi, a U.S. military policeman at Fort Legget (sic), drove up to Springer's liquor store in West Sacramento. (RT 19.) After doing so, he observed an argument taking place between Dennis Delaney and the driver of a Ford pickup. As the pickup pulled away, Dennis turned and kicked the door of the liquor store. As a result of this, Rinoldi "heard what I believe was glass cracking." (RT 24.) Rinoldi did not observe the condition of the door prior to the incident. (RT 20), nor, apparently, did he observe it afterwards.

No representative of Springer's liquor store appeared to establish either the ownership of the property nor the condition of the door prior to June 11th. No testimony was adduced to shed light on whether Dennis' motives -- if he was, in fact, the cause of any glass breaking -- could be characterized as "malicious".

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ARGUMENT

I

THIS CASE WAS TRIED, IN EFFECT, PURSUANT TO THE SUBSTANTIAL EVIDENCE RULE, AND WAS IMPROPERLY RESOLVED ON THE BASIS OF THE REFEREE'S PERSONAL OPINIONS AND SPECULATION

The case of Dennis and Donald Delaney is a classic one. Two boys find themselves in a dispute with an adult. They claim the adult was trying to sexually molest them. The adult asserts that the boys -- who do not appear to have prior criminal records -- attempted to take his wallet. When police arrive at the scene, the boys attempt to tell their side of the story, but are abruptly told to "shut up" by an officer; only the adult is paid any attention.

When the case reaches court -- and of course it's the two boys who are being prosecuted, not the adult -- the unequal contest continues. The adult's story contains elements consistent with suspicious activity: parking in a secluded area near a homosexual bar and not carrying a wallet (perhaps to prevent his identification should he make the common mistake of soliciting a vice officer). The boys stick to their story, and are supported by a third-party eyewitness.

But in what had the flavor of a foreordained conclusion, the Juvenile Court referee decided to believe the adult, though his reference to him as the "so called victim" would suggest the existence of considerable uncertainty.

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Since the referee is not empowered to finally decide the matter, a judge then read a written transcript of the proceedings, but heard no live testimony himself. Though an assessment of the demeanor and credibility of witnesses was stressed by the prosecutor, the judge has no difficulty in declaring himself "independently" satisfied beyond a reasonable doubt of the boys' guilt from his reading of the cold transcript, which is, of course, devoid of any "demeanor" evidence.[4a]

The case was then returned to the referee for sentence, and his obvious doubts about the case are expressed in the imposition of what would otherwise appear to be an unreasonably mild disposition: six months probation without wardship for one boy; wardship probation for the other.

We have characterized this case as "classic" because it involves a contemporary manifestation of a weakness which has plagued our legal system for at least as long as facts have been found by listening to the testimony of witnesses. That weakness is the tendency to ignore the rights of those of lesser social stature when pitted against someone of higher stature.

4a. It is currently deemed poor form to openly admit that one is resolving a petition for rehearing according to the substantial evidence rule (In re Randy R. (1977) 67 Cal.App.3d 41), regardless of whether the transcript contains sufficient information to permit use of a higher standard. (See part II, post.)

Merchants, teachers, police officers, and adults in general are accorded the status of "person" in our society. Young people, however, are more often treated like non-persons whose legitimate interests can safely be ignored by those in authority -- at least as long as one takes care not to leave bruises. [but cf. Ingrahm v. Wright (1977) -- U.S. -- [51 L.Ed.2d 711.]] As non-persons, the young are often not seen and not heard in courts of law.

The history of the law is replete with examples in which non-persons have been openly ignored by the courts. There is the case of Dredd Scott v. Sandford (1857) 60 U.S. [19 How.] 393 for example; and there is the case of People v. Jones (1867) 31 Cal 566, 573, wherein whites were given virtual license to commit crimes against the Chinese by virtue of the law's refusal to permit a Chinaman to testify against a white. Those accused of crimes were, until comparatively recent times, deemed per se such a lowly lot that courts would not allow themselves to be sullied by testimony or evidence of an accused. (D. Mellinkoff, The Conscience of A Lawyer (1973) 51-52; H. Stephen, "The trial of Sir Walter Raleigh", Transactions of the Royal Historical Society, 172, 184 (4th Ser. Vol. 2, 1919): "The modern reader of Raleigh's trial is struck by the fact that he had no assistance from counsel. He likewise would not have been allowed to call witnesses had he wished to do so. . . . [The accused was] defended by the argument that the case

against [him] had to be completely proved. If this was done, no witnesses or counsel on the other side need be attended to; if it was not done, none were needed."

The operation of this process in the Juvenile Court is quite pronounced. Most attorneys with substantial experience in defending juveniles accused of crime will stoutly agree that no one ever believes a kid. In Juvenile Court there are no juries, of course; and thus no means of submitting contested cases to a body which is immune to pressure and criticism.

A fair reading of the referee's memorandum decision here shows unmistakably that this case was tried according to much the same rules as were employed in 1603 when Raleigh was tried. The referee limited himself to consideration of whether there was anything "inherently unreasonable" in the complainant's testimony; i.e., whether the case was "completely proved". Concluding that the testimony was not "inherently unreasonable", the referee then proceeded to expressly state that he would not give any serious or detailed consideration to the boy's testimony; no witnesses or counsel on the other side needed to be attended to once a prima facie case had been made. The referee then resolved the matter on the basis of his personal opinion that the boys believed homosexuals to be "easy pickings". (Clerk's Supp. Transcript, II.)

A minor accused of a crime has a right to have

his case determined according to the standard of reasonable doubt, not "inherent unreasonableness" of the People's case. (Welf. & Inst. Code § 701; In re Winship (1970) 397 U.S. 358.) He has the right to have any exculpatory evidence he presents heard, and given thoughtful consideration. (In re Gault (1967) 387 U.S. 1; Washington v. Texas (1967) 333 U.S. 257, 273; see People v. Coleman (1975) 13 Cal.3d 863-864, 867.)

Cases must, moreover, be decided on the basis of inferences reasonably drawn from a careful weighing of all the evidence. While expressions of opinion based on inferences fairly drawn from evidence are permissible, (e.g., Taliaferro v. Taliaferro (1962) 203 Cal.App.2d 642, 648), for a court to employ mere "personal opinion" as a basis for declaring that two boys consider homosexuals to be "easy marks" for robbery, where no evidence has been introduced that appellants are hostile toward honosexuals, that they have engaged in past acts of aggression against homosexuals, or that they would tend to consider them "easy marks"[5/] is to decide the case on the basis of nothing more that rank speculation and prejudice.

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5. The only evidence on this subject was Donald's express denial of any such bias (RT 43-44), which was not contradicted by any other evidence.

The court in Adoption of Richardson (1967) 251 Cal.App.2d 222, dealt with a case wherein a trial judge had denied a petition for adoption on the basis of his personal opinion that deaf persons were per se unfit parents. In reversing, the court said, "Bias equates here with partiality. Here the judge had a fixed opinion. . . . He was under some influence which so swayed his mind in one direction as to prevent his deciding the case according to the evidence . . . ." (Adoption of Richardson, supra, 251 Cal.App.2d at 232.)

The juvenile court here deserves to be sharply rebuked for the sloppy and shoddy manner in which it has approached the task of factfinding.[6/] Because Donald and Dennis did not, in fact, enjoy their constitutional rights to proof beyond a reasonable doubt before a conscientious and unbiased trier of fact, their conviction for attempted robbery must be reversed.

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6. The problem is one of statewide significance. See Fleming, J., dissenting in In re Lionel P. ___ Cal. Rptr. ___ [62 Adv.Cal.App 832, 837 (hrg. grtd., see 20 Cal.3d 260)]; In re Eugene M., (1976) 55 Cal.App.3d 650.

WHEN IT IS IMPOSSIBLE FOR A JUDGE TO "INDEPENDENTLY" DETERMINE A CASE FOLLOWING THE ADVISORY DECISION OF A REFEREE WITHOUT REFERENCE TO THE DEMEANOR OF CONFLICTING WITNESSES, IT IS ERROR FOR HIM TO DECIDE THE CASE SOLELY ON THE BASIS OF A COLD TRANSCRIPT WHICH IS DEVOID OF THE ESSENTIAL DEMEANOR EVIDENCE

Article VI, section 22 of the California Constitution provides that judicial officers other than judges be limited to the performance of "subordinate judicial duties". In its decision in In re Edgar M. (1975) 14 Cal.3d 727, our Supreme Court determined that since referees of the Juvenile Court are not duly-authorized judges, the "subordinate judicial duties" limitations of Article VI, section 22 applies to them. (In re Edgar M., supra, 14 Cal.3d at 732.)

Thus, while it is not impermissable for a case to be tried in the first instance by a referee, the referee's determination of the case is merely "advisory"; the actual and final decision must be made independently by a judge of the Juvenile Court when he reads a written transcript of proceedings before the referee. (In re Edgar M., supra, 14 Cal.3d at 735-736.) If the transcript is not read within the prescribed time, the judge must order a rehearing de novo before a judge. (In re Lionel P. (1977) 20 Cal.3d 260.)

Since the announcement of the Edgar M. decision, two Courts of Appeal have taken pains to emphasize that there is nothing per se unfair about the initial submission of a case to a referee for trial, with later review by a judge on the basis of a transcript. (In re Jay J. (1977)

66 Cal.App.3d 631; In re Gregory M. (1977) 68 Cal.App.3d 1085.)

We respectfully submit that insofar as Edgar M., Jay J., and Gregory M. hold that a minor is only entitled to a fifth-rate trial by transcript before the judge who actually decides his case, there is a denial of the right to confront witnesses and a denial of both due process and equal protection of the laws, as guaranteed by the United States Constitution Amt's VI, XIV. However, since we must recognize that the California Supreme Court has ruled on this point, and that the Court of Appeal is bound by such ruling, we will not devote further argumentation to this point here.

There remains considerable room for discussion. While the process under which Donald and Dennis were tried has been held per se constitutional, it does not follow that every action taken under that process is fair or proper. The fundamental teaching of both our State Constitution and Edgar M. is that for the referee to be confined to subordinate judicial duties, the judge must reach an independent judgment apart from that of the referee; he may not uphold the referee merely because substantial evidence supports his findings. (In re Randy R., (1977) 67 Cal.App.3d 41.)

If, in an individual case, the material contained in a reporter's transcript does not furnish enough

information to permit an independent judgment to be made, then the judge ought to provide himself with such information by ordering the witnesses whose testimony is represented in that transcript to appear and testify before him.

There is not a word of guidance to be found in any California appellate decision as to how a judge should excercise his discretion to adopt or not adopt a referee's findings. While we do not suppose that any appellate court could pronounce a set of rules which would substitute for individual judgment, it can hold that there are instances in which the information necessary for the excercise of sound, independent judicial discretion is not present; and it can prevent the state constitution from being made into a joke by insisting that a judge provide himself with such sufficient information before purporting to reach an independent decision.

This is clearly such a case, for, as the District Attorney made clear in her argument to the referee, the case can only be decided through an assessment of the demeanor of the witnesses, particularly that of the "so called victim", Mr. Perry. (RT 50.)

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A. Due Process and Equal Protection Both Demand That Where Liberty Is At Stake, The Most Reliable - Not The Most Mediocre - Factfinding Methods Be Employed

Liberty stands next only to life itself as the most precious of values. The degree of care and accuracy which must attach to factfinding in a proceeding affecting this interest must therefore be the highest of all. To begin, we recall the general statement of this proposition which the Supreme Court made twenty years ago in Speiser v. Randall (1958) 357 U.S. 513, 520: "To experienced lawyers, it is commonplace that the outcome of a lawsuit . . . . depends more often upon how the factfinder appraises the facts than on a disputed construction of a statute . . . . Thus the procedures by which the facts of the case are determined assume an importance fully as great as the substantive rule to be applied. And the more important the rights at stake, the more important must be the procedural safeguards surrounding those rights." (Emphasis added.)

In 1971, this theme was elaborated upon by the court in In re Winship (1970) 397 U.S. 358, where it was declared that a juvenile accused of crime must be proven guilty beyond a reasonable doubt.

"The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interest of immense importance, both because of the possibility he may lose his liberty upon conviction

and because of the certainty that he would be stigmatized. . . .

"There is always in litigation a margin of error . . . where one party has at stake an interest of transcending value . . . this margin of error is reduced as to him by the process of placing on the other party the burden of persuading the factfinder . . . beyond a reasonable doubt.

"Moreover, the use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. . . . It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.. . . ." (In re Winship, supra, at 364-365.)

The years following Winship have seen the Court take several other opportunities to declare in ever stronger terms that there is little, if anything to distinguish the trial of a juvenile from that of an adult. (Breed v. Jones (1975) 421 U.S. 519; Gagnon v. Scarpelli (1973) 411 U.S. 778, n.2 at 790.)[7] Our Supreme Court has as well recognized that, in the factually contested case, it is appropriate to conduct the proceedings in as formal and careful a manner as would apply in a criminal case. (People v. Superior Court (Carl W.) (1975) 15 Cal.3d 271, 279.)

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7. See Supreme Court Review (1975): Juvenile Law - Double Jeopardy (1975) 66 J. Cr.L & Crim. 408, 415.

It is of obviously equal importance that the method of proof, aside from the theoretical quantum of proof, not leave people in doubt whether the innocent are being condemned.[7a] In a case such as this, such doubts are magnified to intolerable levels where the method employed renders any quantum requirement largely meaningless through

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7a. It is significant that the courts of many other states which have dealt with the legality of the referee system have found it abhorrent on one ground or another. (Hunt v. Wayne Circuit Judges (1905) 142 Mich 93, 119, 105 N.W. 531; K.M. v. State (Fla.App 1973) 277 So.2d 577; Flynn v. Superior Court of Maricopa County (1966) 3 Ariz.App 354, 414 P.2d 438; Cf. In re Gurbino (Ark. 1975) 524 S.W.2d 236.

In the federal system, United States magistrates are allowed to try petty offense cases, unless either the government or defendant objects 28 U.S.C. 636(a) (3); 18 U.S.C. 3401.

its inability to preserve that indispensable part of the evidence consisting of the "wordless language" imparted by the live witness.

B. Demeanor Does Not Shine Through The Lines Of A Cold Reporter's Transcript

The most informative, accurate, and fair manner for a trier of fact to consider the testimony of a witness is for that trier to see and hear the testimony given before him. Because it is impossible to asses the demeanor of witnesses from a cold transcript, our law has recognized from its earliest beginnings that it is unreliable and distinctly second-rate for the testimony of witnesses to be presented by means of the mere reading of notes, depositions, or transcripts. Such methods, it has always been held, are only to be employed as a last resort, as where the death or absence of the witness makes it unavoidably necessary to proceed in such a manner. (See 1 Hale, Pleas of the Crown 305 (1716); Statute, 11 & 12 Vict. c. 42 § 17 (1848); cf. Cal.Ev.Code § 1291.)

Over a century ago, Lord Coleridge summarized the view of the common law saying: "The most careful note must often fail to convey the evidence fully in some of its most important elements - those for which the open oral examination of the witnesses in the presence of the prisoner, judge and jury is so justly prized. It cannot give the look or manner of the witness: his hesitation, his doubts,

his variations of language, his confidence or precipitancy, his calmness or consideration. . . . . It is in short, the dead body of the evidence without its spirit; which is supplied, when given openly and orally, by the ear and eyes of those who receive it." (Regina v. Bertrand (1867) 4 Moo. P.C. (N.S.) 460, 472; see also Fenwick's Trial (House of Commons, 1696) 13 How.St.Tr. 591, 638, 712.)

The earliest reported decisions of American courts also recognized the obvious. In 1849, for example, a Georgia Court was faced with a matter in which the deposition of an available witness in a civil case had been read in evidence over objection. The court responded by saying, "When it is recollected that depositions are admitted only from the necessity of the case; that they are an unsatisfactory species of evidence not known to the common law . . . and is therefore subject to the rule of law which forbids such evidence when better evidence exists . . . [T]he oral testimony of the witness, in the presence of the court and jury is much better evidence than his deposition can be." (Hammock v. McBride (1849) 6 Ga.178, 183.)

Though the civil war was soon to follow, the north and south were united on at least this point; for only a year before, the New York Court had disapproved the reading of a witness' deposition in a criminal case: "[The right of Confrontation] means that [the accused] shall be confronted on the trial, so that the judge and jury may have the opportunity of observing the appearance and manner of

the witness, as well as hearing what he has to say - the former sometimes proving a complete antidote to the latter, as is well known to every nisi prius lawyer." (Barron v. People (1848) 1 N.Y. 386, 391; see also Wigmore, Evidence § 1395(2).)

Through the intervening century - mental telepathy not having been perfected - our courts have continued to find facts by listening to and weighing the testimony of witnesses. That there was also no change in the limitations on the written (as opposed to the spoken) word as a tool of communication during that period was well attested by the late Jerome Frank, writing for the Second Circuit with the concurrence of Justices Augustus and Learned Hand: ". . . [T]he demeanor of the orally testifying witness is 'always assumed to be in evidence' Wigmore, Evidence § 949.[8] It is 'wordless language'. The liar's story may seem uncontradicted by one who merely reads it, yet it may be contradicted in the trial court by his manner, his intonations, . . . and the like - all matters which 'cold print does not preserve', and which constitute 'lost evidence' as far as an upper court is concerned. . . . A stenographic transcript . . . . is like a dehydrated peach; it has neither the substance nor the flavor of the fruit before it was dried." (Broadcast Music v. Havana Madrid Restaurant Corp, 175 F.2d 77, 80 (2 Cir 1949.)

8. As it is declared to be in California. Cal. Ev. Code §§ 780(a), (b), (f), (j). The citation to Wigmore appears to be to an old edition; the current reference (Chadborn Rev. Ed. 1970) would appear to be vol. 5, § 1395(2).

Lest there be doubt that any last minute revelation of science has changed the nature of things for the jurisprudence of California in the 1970's, we aver to Justice Gardner's opinion in Meiner v. Ford Motor Co., 17 Cal.App. 3d 127, 140 (hrg. den.) (1971): " The law has long recognized the problem of appellate review in the manner of credibility of witness based upon their demeanor. A written transcript of testimony is but a pallid reflection of what goes on in court. . . ."[9]

As we have pointed out, in all our hundreds of volumes of reports, one cannot find a single word of guidance or discussion concerning the manner in which the decision to grant a rehearing de novo under Welfare & Institutions Code section 252 should be excercised. There is only one pre-Edgar M. law review commentary, which points out that the usual practice of judges has been to give perfunctory approval to referees' orders. (Gough, Referees in California Juvenile Courts: A Study in Sub-judicial Adjudication (1967) 11 Hast.L.J. 3, 6.)

One can, however, find enlightenment in other areas of the law where sub-judicial officers are employed to hear evidence under the supervision of a judge. All discussion of the process of judicial review of such sub-

9. Justice Gardner's opinion cites similar statements in several earlier California cases, (in addition to Broadcast Music v. Havana Madrid Restaurant Corp, supra): Maslow v. Maslow (1953) 117 Cal.App.2d 237, 243; Cummings v. Kendall (1940) 41 Cal.App.2d 549, 555; Riddle v. Faino (1961) 194 Cal.App.2d 684, 693.

judicial findings points to the inevitable conclusion that the supervising judge cannot re-weigh the demeanor and credibility of conflicting witnesses. Depending on the substantiality of the interests involved, this has led either to the adoption of a "substantial evidence" standard of review, or else to holdings that conflicting evidence must be personally heard and weighed by the judge having ultimate decision-making authority. 10/

For example, federal District Judges, reviewing the findings of referees in bankruptcy pursuant to 11 U.S.C. § 67(c) have been forthright in stating that they cannot and therefore will not second-guess findings of fact made by referees on conflicting evidence. (In re Rosenberg (2d Cir. 1945) 145 F.2d 896, 898 (and authorities cited); In re Katz (E.D.N.Y. 1938) 23 F.Supp. 429, 430; In re Zipco (S.D.Cal 1957, I.R. Kaufman, J.) 157 F.Supp. 675, 677: "I must accept the referee's findings of fact unless clearly erroneous".

In another context, one more comparable to that here in that personal liberty is at stake, the United States Supreme Court condemned the practice of some federal trial judges of referring hearings on issues of fact which arose in habeas corpus cases to United States magistrates. (Wingo v. Wedding (1974) 418 U.S. 461.)

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10. 28 U.S.C. § 636 sets up a dual standard for judge's review of the work of U.S. magistrates. Where the magistrate has determined a pre-trial matter, a "clearly erroneous" standard is used. In post-trial criminal proceedings, the magistrate's findings are subject to de novo redetermination on request of a party.

"One of the essential elements of the determination of crucial facts is the weighing and appraising of testimony . . . We cannot say that an appraisal of the truth of the prisoner's oral testimony by a master or commissioner is, in the light of the purpose and object of the proceedings, the equivalent of the judge's own excercise of the function of the trier of facts" 418 U.S. at 467, quoting Holiday v. Johnston (1941) 313 U.S. 342, 352.) 11/

There is no basis for a conclusion that judges of the superior court possess the ability to breathe life into dried peaches, dead bodies, or cold transcripts; it has been held often, for example, that such judges have no power to second-guess the judgment of a committing magistrate upon reading a reporter's transcript of a felony preliminary hearing. (People v. Hall (1971) 3 Cal.3d 992, 996.) As we are informed by the Jay J. opinion, 66 Cal.App.

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11. The Wingo decision was on a vote of 7 to 2. Even the Chief Justice's dissent, however, would recognize the necessity for the district judge to personally hear the evidence where the outcome of the case turned upon the assessment of conflicting testimony. (418 U.S. at 487.)

Cases decided prior to Wingo which reached similar results include McKinney v. Parsons (5 Cir. 1974) 488 F.2d 452 [Error to give magistrate responsibility of hearing evidence on question of whether material was obscene]; Ingrahm v. Richardson (6 Cir. 1972) [Error to assign evidentiary hearing in Social Security case to magistrate]; T.P.O. Inc. v. McMillen (7 Cir. 1972) 460 F.2d 348 [Error to refer motion for summary judgment to magistrate.]

3d at 634, the qualifications of referees of the Juvenile Court are comparable to those of committing magistrates; it follows that superior judges have no greater powers to "independently" breathe demeanor evidence back into a reporter's transcript produced by a referee then they have to breathe it into one produced by a magistrate.

In this case, because it was plainly necessary for the trier of fact to assess demeanor evidence to reach a proper and independent decision of the case, the role of the referee has been impermissably elevated to something more than a "subordinate" level. For this reason, and for the reason that the entire record herein is affected by a strong scent of injustice, reversal is plainly warranted, with directions to the judge of the Juvenile Court to grant a rehearing de novo and hear the evidence himself.

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III

THE SUBSTANTIAL EVIDENCE RULE, AS IT IS TRADITIONALLY UNDERSTOOD, DOES NOT CONSTITUTE A CONSTITUTIONALLY ADEQUATE STANDARD OF APPELLATE REVIEW WHERE TRIAL BY JURY IS DENIED. THE RULE OF REASONABLE DOUBT COMPELS A REVIEWING COURT TO DETERMINE WHETHER A CONVICTION IS SUPPORTED BY THE WEIGHT OF EVIDENCE ON THE WHOLE RECORD

INTRODUCTION

If, notwithstanding our second argument, it should be determined that the juvenile court judge possessed sufficient occult power to impart the spark of life to the instant cold transcript, then it would seem inescapably to follow that the presumably more august justices of a reviewing court are possessed of at least equal attributes. There would be no longer any basis for a reviewing court to defer to the trier of fact's determinations re the credibility of witnesses, as now the trier - the juvenile judge with his transcript - has had no more opportunity to assess credibility and weigh evidence than have the appellate justices.

It is with this as a background that we will proceed to examine the origins and validity of the so-called substantial evidence rule as it applies to juvenile cases.

* * * * *

As pointed out in Part I, ante, there once was a time, during the dark ages of the history of the Anglo-American legal system, when an individual accused of crime

was not permitted to testify nor call witnesses in his defense.[12]

It has long been recognized that the purpose of the Sixth Amendment-encompassing the rights to notice, counsel, and compulsory process - was to rectify this state of affairs; to "permit any individual who was charged with any crime, to prepare his defense". (United States v. Burr (#14, 692d C.C.D. Va. 1807, per Marshall, C.J.) 25 Fed. Cas. 30, 32.) In so doing, a proper concern for factual accuracy was injected into a system which had once been so smug as to hold it an "honor" that no defense was permitted an accused, since "respectable" people simply were not indicted. (D. Mellinkoff, The Conscience of a Lawyer (1973) 51-52.)

Accordingly, the United States Supreme Court has on many occasions held that the right to present a defense is a fundamental right, applicable to the states through the due process clause of the Fourteenth Amendment. (In re Oliver (1948) 333 U.S. 257, 273; Washington v. Texas (1967) 388 U.S. 14, 17; Specht v. Patterson (1967) 386 U.S. 605, 610; In re Gault (1967) 387 U.S. 1; California v. Green (1970) 399 U.S. 149, 176-177 (Harlan J., concurring); see also People v. Coleman (1975) 13 Cal.3d 867, 863-864 (Right to a defense in probation revocation case).)

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12. H. Stephen, "The Trial of Sir Walter Raleigh" Transactions of the Royal Historical Society (4th Ser. Vol. 2, 1919) 172, 184

Yet it would seem that California Appellate Courts, operating under the so-called substantial evidence rule, are still living in the sixteenth century as far as review of evidence of guilt is concerned. For, what the rule means in the bluntest terms is that once a single witness has testified that "the defendant did it", it would matter not whether 20 bishops then took the stand to attest the defendant was in Rome at the time, attending an audience with the Pope. When the evidence is in conflict, an "iron curtain" is raised which cuts off any adequate review of the soundness of a finding. (See Mercer v. Perez (1968) 68 Cal.2d 104, 114.) This in turn means that should a trier of fact decide silently that he will conduct trials upon substantial evidence, a la Sir Walter Raleigh, ignoring his duty to dispassionately weigh the evidence, and automatically convicting in every case where a witness - any witness - testifies to elements one through four, he will get away with it, and have a perfect record of affirmances on appeal.[13]

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13. It is not our intention in pointing this out to cast any aspersion upon the referee who decided this case, but to point out that the present system - particularly because it is devoid of juries - creates a realistic possibility of trials by substantial evidence which are immune from any review. This possibility increases directly with increased public pressure on the courts to "crack down" on accused juveniles.

We think that one should be able to look at the outcome of a trial and conclude with some assurance that the result reached was not arrived at by lot or by rote. The state of affairs created by blind application of the substantial evidence rule is exactly what the Supreme Court had in mind when it stressed that "It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned". (In re Winship, supra at 364.)

The refusal of appellate courts to sully themselves with consideration of the central issue in any criminal case - namely, whether the defendant is guilty - has led to much understandable public criticism of the appellate process and, we think, a degree of public confidence in the appellate courts which is perhaps less than what it should be.

"In recent years, courts in criminal cases have largely focused on procedural issues. . . . It would be ironic if this procedural preoccupation, designed to strengthen an accused's legal rights at the cost of acquitting some of those who are factually guilty, caused the courts to lose sight of the primary objective of evidentiary rules, which is to protect those who may be factually innocent by requiring credible probative evidence of guilt". (In re Eugene M., (1976) 55 Cal.App.3d 650, 656-657.) (emphasis added.)

A. The Substantial Evidence Rule Is Judge-Made Law, Without Statutory Or Constitutional Foundation

The origin of the substantial evidence rule is, at best, murky. One can blow dust off the old volumes in the library and find nineteenth century cases where the court decided whether a verdict was against the weight of the evidence, and employed a test of whether the evidence reasonably pointed only to the hypothesis of guilt as per the standard jury instructions on the subject. (People v. Harris (1893) 136 N.Y. 423, 428; People v. San Martin (1852) 2 Cal 484; People v. Staples (1906) 149 Cal 405.)

By the middle of the twentieth century, however, the substantial evidence rule had been firmly fashioned by the courts of this state as examplified by the following language from People v. Newland (1940) 15 Cal.2d 678, 681-682: "The court on appeal will not attempt to determine the weight of the evidence. . . . It must clearly appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached by the court below.

"[T]he rule that circumstances relied on by the prosecution must be consistent with guilt and inconsistent with any other hypothesis is a rule of instruction for the

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jury, and it is not the rule for the guidance of the court on review."

Similarly, in People v. Reyes (1974) 12 Cal.3d 486, 497, it is said, "The test on appeal is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt" (emphasis added); see also People v. Anderson (1974) 38 Cal.App.3d 952, 956.

The substantial evidence rule may well be justified in cases which are tried to a jury. Juries have the virtue of being immune from political pressures exerted by other organs of government,[15] and, perhaps above all, they do not know what they can get away with under the substantial evidence rule.

The purpose of the jury is to serve as a buffer between the state and the individual whose life or liberty is at stake. If judges were empowered to overturn verdicts supported by substantial evidence because they merely disagreed with them, the jury would be converted into a mere fixture. Preservation of the jury's important role thus requires something akin to the substantial evidence rule. (See U.S. Const.Amt. VII; Compare Pen. Code § 1118 with § 1118.1.)

The juvenile court is a forum from which the jury has been excluded. (McKeiver v. Pennsylvania (1971) 403

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15. See Duncan v. Louisiana (1968) 391 U.S. 145.

U.S. 528.) It is thus a forum where, though the same interests and forces at play are the same as in criminal matters, all power and discretion is vested in judges. In this, there is danger. To quote Lord Camden, "The discretion of a judge is the law of tyrants: It is always unknown: It is different in different men: It is casual, and depends on constitution, temper and passion. In the best, it is oftentimes caprice: In the worst, it has every vice, folly and passion to which human nature is liable." (The Case of Hindson & Kersey (Circa 1680) 8 How. St. Tr. 57.)

Echoing comparable sentiments, in 1972, a committee of the State Bar observed that indeed "many lawyers are reluctant to waive a jury because they do not want to rely upon the judgment of one man, the judge. And the present restrictions permit a judge to "fudge" his facts to reach a result in the trial court which will not be subject to reversal on appeal". . . . . (The Court of Review, A New Court for California? (1972) 47 Cal.St Bar J. 28, 30.)

The converse of the reasoning which leads to the substantial evidence rule in cases tried to a jury leads to the conclusion that where a jury is denied and the reasoning of the trier of fact unknown, minimum concepts of due process and the rule of reasonable doubt require that a reviewing court to independently scrutinize the correctness of findings on the weight of evidence in the

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whole record.[14] (See Kennedy, The Substantial Evidence Rule: A Coverup for Insubstantial Due Process (1974) 50 L.A.Bar Bull. 72.)

That our contention is anything but radical is shown by the fact that a majority of contemporary appellate courts in the United States - even in cases tried to a jury - take the view that fairness requires review of the totality of the evidence, as Justice Elkington points out in his concurring opinion in People v. Blum (1973) 35 Cal.App.3d 515, 521-530 (hrg. den.): "The 'any substantial evidence' rule, at least as applied to criminal appeals, seems peculiar to this state.

"The scope of inquiry of appellate courts in other jurisdictions, when inquiring into the sufficiency of evidence as a matter of law, to support a verdict of guilt is illustrated by the following selection. The Texas Court of Criminal Appeals states: '[I]t is proper to consider the entire record with each and every fact which throws light on the subject. . . .' (Villareal v. State, 140 Tex.Crim. 675 [146 S.W.2d 406, 409].) Indiana's Supreme Court, in a questionable identification case, says: '[W]e consider the inherent inconsistency and improbability, particularly as to the essential element of identity. . . .

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14. An outstanding example of the rancor which is created when an appellate court refuses to do this, but dryly applies the "no hypothesis whatsoever" formulation to uphold the conviction of a juvenile whose guilt was not clearly established is seen in In re Lynette C., 54 Cal.App.3d 1087, 1094, 1095-1102 (Jefferson, J., dissenting).

[S]ome of the most tragic errors of courts of law have been chiefly due to honest but imperfect and over-zealous attempts of witnesses in making identifications.' (Thomas v. State, 238 Ind. [154 N.E.2d 503, 506].) Minnesota's courts hold: '[T]he question of the sufficiency of the evidence to sustain the verdict . . . is then to be determined on appeal by a consideration of all the evidence presented in the case.' . . .' (State v. Golden, 216 Minn. 97 [12 N.W.2d 617, 619.].) Illinois', Ohio's, and New Jersey's appellate courts will also consider the 'entire record'. (People v, Kincy, 72 Ill.App.2d 419 [219 N.E.2d 662, 665-666]; State v. Urbaytis, 156 Ohio St. 271 [46 Ohio Ops. 139, 102 N.E.2d 248, 252]; State v. Fischer, 97 N.J.L. 34 [117 A. 519] [affd. 98 N.J.L. 293 (118 A. 927)].) Virginia's courts will review 'all the evidence' (Spangler v. Commonwealth 188 Va. 436 [50 S.E.2d 265, 266]), and South Carolina's, 'the entire testimony, including that offered by appellants' (State v. Thompkins, 220 S.C. 523 [68 S.E.2d 465, 466]). And in such an inquiry, the United States Court of Appeals (10th Cir.) asserted: 'We must consider the case as a whole and not piecemeal. The lines of proof must be considered together, not separately. . . .' (Corbin v. United States, 253 F.2d 646, 649.)" 35 Cal.App.3d at 528.

Appellate courts are, after all, able to weigh evidence to some degree. While demeanor is important -

especially here - other factors such as consistency and probability are equally so, and these factors do show through a transcript.

"[T]here are undoubtedly many cases where the credibility of the witnesses, per se, is not the factor which decides a contested issue of fact, and often it doesn't help much whether the judge has 'looked him in the eye' or not." (The Court of Review, etc., supra, 47 Cal. St.Bar J. 28, 30 (1972).)

In this case, though credibility and demeanor are important, one must conclude that the totality of evidence leaves one with a reasonable doubt. Were reviewing courts truly unable to consider the total record, it would be impossible to have a harmless error rule. Appellate Courts would have to say in every case of gossamer error that even though a parade of witnesses testified to the defendant's guilt, for all we know they all had sweaty palms and shifty eyes, and this seemingly insignificant error may have just tipped the scales. See People v. Eli (1967) 66 Cal.2d 63, to pick one out of a thousand "harmless error" cases which could be cited.

In re Winship (1970) 397 U.S. 358, the court declared right to proof beyond a reasonable doubt to be a matter of constitutional right in juvenile and criminal cases. In light of this, it is no longer appropriate for state courts to maintain that they will not determine whether

there has been such proof, for to do so is to flatly proclaim that they will refuse to enforce the Constitution of the United States.16/

Appellate courts are duty bound to enforce the constitution, and they are therefore bound to guard against the possibility of trials by "any substantial evidence".

A person who has been deprived of his reputation and his liberty in a juvenile proceeding is constitutionally entitled to appellate review of the whole record, not just the direct testimony of witnesses who state he is guilty. He is entitled to a reversal, as here, should the totality of that evidence leave the reviewing court with a reasonable doubt as to his guilt.

Applying that standard to the instant case, we submit that the totality of evidence here, i.e., a flimsy

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16. The leading post-Winship juvenile case, In re Roderick P., (1972) 7 Cal.3d 801, 808-809, holds the substantial rule applicable. This holding may be considered dicta in that it was not necessary for the court to decide whether more than substantial evidence review was required when it found that less than substantial evidence was present. (Such an issue was also not raised in the briefs.) To the extent that this language is not considered dicta, however, it is respectfully submitted that that part of the decision was wrongly decided, and that it should be overruled.

prosecution case contradicted by substantial evidence of innocence, raises a reasonable doubt as a matter of law, and requires reversal.[17]

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17. In People v. Reyes, supra, 12 Cal.3d at 486, 499, the court observed that "Implicit in our duty to determine the legal sufficiency of evidence to sustain a verdict is our obligation, in a proper case, to appraise the sufficiency and effect of admitted or otherwise indubitably established facts as precluding or overcoming, as a matter of law, inconsistent inferences sought to be derived from weak and inconclusive sources."

IV

THE MALICIOUS MISCHIEF COUNT AGAINST DENNIS IS NOT SUPPORTED BY EVIDENCE

The evidence used to convict Dennis Delaney of malicious mischief was woefully insufficient. Initially, it was not conclusively established that any action by Dennis was the cause of the breaking of any glass at Springer's liquor store. The only testimony was that of a bystander who testified that he heard "what I believe was glass cracking". (RT 24.) The witness did not even testify that he inspected the glass door after Dennis allegedly kicked it, or that he actually observed the glass to be broken. Nor was it proven that the glass in the door was not previously broken. Finally, bearing in mind that it is the state's duty to prove all elements of the crime, not the defendant's duty to negate them (In re Winship, supra, 397 U.S.358) there was no competent proof that the property in question was that of another.[18]

Most crucial, however, is the omission of any proof that any property damage which may have occured was the result of malice. Without proof of the mental state of malice, there can be no conviction for malicious de-

18. The referee found significance in the fact that the store was known as "Springer's". Though we have not attempted to investigate the title to Springer's, we would point out that it is not impossible for the store to have been operated by a trust of which Dennis could be beneficiary, with "Springer's" as a D.B.A. It is the state's duty to negate any such possibility.

struction of property. Penal Code section 594(a) provides: "Every person who maliciously destroys any real or personal property not his own -- is guilty of vandalism. Destruction is accomplished maliciously when it is the result of a 'wish to vex, annoy or injure another person. . . .'" (Pen. Code § 7(4); CALJIC § 1.22.)

"It is generally held that this calls for more than mere intentional harm without justification or excuse; there must be a wanton and willful (or reckless) disregard of the plain dangers of harm, without justification, excuse or mitigation." (1 Witkin, California Crimes §470 (and authorities there cited.)

In People v. Wild (1976) 60 Cal.App.3d 829, the court observed that the act of throwing five cinder blocks through the windows of a beer bar, each of which was aimed at a neon beer sign, constituted malicious mischief. In Mersick v. Superior Court (1922) 57 Cal.App 340, it was held that the deliberate tearing down of a fence surrounding the complainant's house was malicious.

Here, what scanty evidence there is tends to show that whatever Dennis may have done was not done with malice: it was testified that he was arguing with the driver of a pickup in the parking lot, and that when the pickup sped off, Dennis kicked out in anger. Such would appear to constitute the "excuse" specified in Penal Code section 7; one could say, taking a bit of literary license, that

Dennis' act was at best one of voluntary glass-slaughter, done in the heat of passion.[19]

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19. The juvenile referee, while purporting to make findings of fact regarding the ownership of the store, did not appear to give any consideration to the essential element of malice. No finding as to this element appears in his memorandum decision. (see Clerk's Transcript 1.)

APPENDIX J

CONCLUSION

For the reasons set forth above it is respectfully requested that the judgments each be reversed.

DATED: February 6, 1978

Respectfully submitted,

PAUL HALVONIK
State Public Defender

GARY S. GOODPASTER
Chief Assistant
State Public Defender

LAURANCE S. SMITH
Deputy State Public Defender

Attorneys for Appellants

DECLARATION OF SERVICE BY MAIL

I, SANDRA A. FREDERICKSON , declare as follows: I am over the age of 18 years, and not a party to the within action; my place of employment and business address is 555 Capitol Mall, Suite 350, Sacramento, California 95814.

On February 21, 1979 , I served the attached

BRIEF OF RESPONDENT PEOPLE OF THE STATE OF CALIFORNIA IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

by placing a true copy thereof in an envelope addressed to each of the persons named below at the address set out immediately below each respective name, and by sealing and depositing said envelope in the United States Mail at Sacramento, California, with postage thereon fully prepaid. There is delivery service by United States Mail at each of the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed:

COURT OF APPEAL
Third Appellate District
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I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 21, 1979 at Sacramento, California.

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Declarant

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-817

DONALD EVERETT D.,
DENNIS LOUIS D.,

Petitioners,

v.

THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF THE STATE
OF CALIFORNIA, THIRD APPELLATE DISTRICT

BRIEF IN REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT ARGUES THAT EVERY TRIER OF FACT MAY MEASURE THE SIZE OF A "REASONABLE" DOUBT FOR HIMSELF IN AS ERRATIC A MANNER AS HE DESIRES, AND THAT SUCH MEASUREMENT SHOULD BE INSULATED FROM ALL REVIEW

In his response to the petition, respondent asserts baldly that the right to proof of guilt beyond a reasonable doubt is a right whose application and enforcement is within the "exclusive province of the trier of fact". (Resp. pp. 14-15; emphasis in original.) In making this assertion, for which no germane authority is cited, respondent begs the precise question which we have asked the Court to decide.

Respondent seeks support for his position in decisions of this Court which have defined the standard applied by this Court for its review of facts, e.g., Thompson v. Louisville (1960) 362 U.S. 199. But this Court, as a national court of policy, obviously could not undertake substantive review of the sufficiency of evidence in every state criminal case even if it were inclined to do so. "[A] court of law, such as this Court is,

rather than a court for correction of errors in factfinding, cannot undertake to review . . . findings of fact. . . ." (Graver Manufacturing Co. v. Linde (1949) 336 U.S. 271, 275.)

Respondent would have it follow from the limitations which necessity has forced this Court to impose upon the scope of its own review of facts that there should be no review of facts at all. He thus purposefully ignores a distinction which we were careful to draw (Pet. p. 17, n. 11) between the proper role of this Court and that of a first-level, non-discretionary appellate court. The Court has noted in the past that review of a whole record for substantial evidence is a task properly within the keeping of the Courts of Appeal (Mobil Oil Corp. v. F.P.C. (1974) 417 U.S. 283, 310) but has not as yet directly taken up the important question of whether that task is not a fortiori within the keeping - and the duty - of such courts when they undertake review of a criminal conviction.

The very definition of the word "reasonable" as an objective rather that /

subjective concept[1] belies respondent's position that the size of a reasonable doubt may be made to vary as the length of the trier of fact's foot, and that not even review for clear failure to establish guilt beyond a reasonable doubt is required. (cf. Burks v. United States (1978) 437 U.S. 1, 17; King v. United States (App. D.C. 1967) 372 F.2d 389.) For, as Felix Frankfurter pointed out long ago, "Discretion without a criterion for its excercise is authorization of arbitrariness". (Brown v. Allen (1953) 344 U.S. 443, 496.)

It can be seen from examination of the instant record that the refusal of California reviewing courts to do more then look for the first scintilla of inculpatory evidence, and their failure to recognize the existence of anything to the contrary, leads exactly to the kind of arbitrariness on the trial level whereby inculpatory testimony is accepted

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1. Webster's 3rd New International Dictionary (1971) p. 1892, defines "reasonable" as: "Being in agreement with right thinking, right judgment -- not extreme, not excessive. . . ."

if it is not "inherently unreasonable", exculpatory evidence is not "carefully dissected", and decisions are made on the basis of a "personal opinion" which is supported by no evidence at all.[2] (Pet. App. "B".)

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2. We do not disagree with respondent's statement of the law that statements of opinion are permissible where "based upon inferences fairly drawn from a consideration of the evidence produced at trial". (Resp. pp. 23-24.) While the evidence here does show that the complaining witness was of slight build and on his way to a homosexual bar, it fails to contain any suggestion that petitioners had a propensity to rob or to engage in unprovoked acts of violence against such individuals. The juvenile court's statement to this effect is thus rank speculation, and does not constitute an acceptable basis for resolution of the conflicts in the testimony.

In conclusion it can be seen that review according to a standard of "any evidence" creates an impermissible risk that trials themselves will be conducted according to the same standard; the moral force of the law will thus be diluted by the resultant uncertainty as to whether innocent men are being condemned.

(In re Winship (1970) 397 U.S. 358, 363-364.)[3]

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3. In this context, it may be worth recalling the very grave dilution of the law's moral force which resulted from an appellate court in Massachussetts' refusal to examine the evidence in the ill-starred case of Sacco and Vanzetti. (Commonwealth v. Sacco (1927) 261 Mass. 12, 17; compare, e.g., R. Feuerlicht, Justice Crucified (1977) p. 211.

II

CALIFORNIA MAINTAINS THAT REFEREES ARE "FACTFINDERS" TO SUIT ITS PURPOSES HERE, BUT "SUBORDINATES" TO SUIT ITS PURPOSES IN OTHER CASES

Respondent seeks to answer our arguments concerning the unconstitutionality of "trial by transcript" by asserting that the subordinate referee who heard the testimony was actually the trier of fact, rather than his superior judge who read the transcript and entered the final order. Respondent concedes that the superior judge excercised independent judgment when he found on the basis of this transcript that proof beyond a reasonable doubt had been adduced. (Resp. p. 27.)

It is settled in California that the "judge", when he reads a referee's transcript in this manner, engages in de novo factfinding rather than appellate review. (In re Randy R. (1977) 67 Cal.App.3d 41; 136 Cal.Rptr. 419.) If a referee were to make a finding of fact himself, such finding would be "jurisdictionally defective" under state law which confines referees to the performance of "subordinate

judicial duty". (Ibid.; In re Damon C. (1976) 16 Cal.3d 493, 498; 128 Cal.Rptr. 172.)

It is most significant to note that following this Court's reliance upon the equally subordinate status of Maryland's juvenile Masters to reach the conclusion that a judge's overturning of finding of acquittal did not constitute double jeopardy (Swisher v. Brady (1978) ___ U.S. ____, 98 S. Ct. 2699, 2708), the Attorney General of California has urged that this Court remand a California case to the California Supreme Court for consideration as to whether state statutes should be "construed" to permit prosecutors to overturn referee acquittals, which they would characterize for that purpose as subordinate and non-binding. (California v. Jesse W. # 78-327, Petition for Ceriorari.) Having obtained the desired remand from this Court, ___ U.S. ___, 99 S. Ct. 304, the state Attorney General has filed a brief with the California court which in fact urges such construction. ("Response to Petitioner's Supplemental Brief", Cal. S. Ct. # SF 23580, filed Jan. 16, 1979.)

In another case, the state Attorney

General has been successful in obtaining a holding from the Third District Court of Appeal[4/] that a minor who has been sentenced by a referee may be pulled back into court by a "judge" who has acted on the basis of secret, ex parte arguments from the prosecution, and be re-sentenced to a state institution -- even though the minor has commenced service of the sentence ordered by the referee. (In re Jonathan S. (1979) 88 Cal.App.3d 468; ___ Cal.Rptr. ___.)

For the Attorney General of California to take the position here that the referee is really a "factfinder" after having taken a highly inconsistent position in the Jesse W. and Jonathan S. matters is, to put it mildly, disingenuous. That the referee system is susceptible to this kind of result oriented, worst-of-both-worlds manipulation underscores the need for this court to grant the writ here and determine what outer limits due process may place upon factfinding through use of subordinate judicial officers.

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4. The same court as decided the instant case.

CONCLUSION

The arguments in opposition to the petition have only served to place in sharper relief the need for resolution of the merits of the questions tendered by it.

DATED: March 2, 1979

Respectfully submitted,

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